COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2016-0237

MIDDLESEX SUPERIOR COURT
No. 1981-CR-1712/14

COMMONWEALTH

vs.

JAMES RODWELL

MEMORANDUM OF DECISION

This matter is before me on the defendant's petition pursuant to the gatekeeper provision of G. L. c. 278, § 33E, for leave to appeal the denial of his seventh motion for new trial. The defendant filed his motions after we affirmed his conviction, among other charges, for murder in the first degree. Commonwealth v. Rodwell, 394 Mass. 694 (1985).

1. Procedural history. The defendant was convicted of murder in the first degree in 1981. Over the next thirty-five years, the defendant filed one direct appeal, see id., seven motions for a new trial (in addition to other state appellate litigation), and a federal habeas corpus petition, all of which were ultimately unsuccessful. On May 20, 2016, after an evidentiary hearing, a judge of the Superior Court (Billings,

J.), denied the defendant's seventh motion for a new trial, which is the subject of this gatekeeper petition.

2. Standard of review. Under G. L. c. 278, § 33E, the defendant must present "a new and substantial question which ought to be determined by the full court" in order for his application to be granted. Commonwealth v. Ambers, 397 Mass. 705, 707 (1986). "An issue is not 'new' within the meaning of G. L. c. 278, § 33E, where either it has already been addressed, or where it could have been addressed had the defendant properly raised it at trial or on direct review." Id., quoting Fuller v. Commonwealth, 419 Mass. 1002, 1003 (1994).

3. Discussion. After an extensive sixteen-day evidentiary hearing, which included the testimony of twenty-nine witnesses, the judge denied the defendant's motion in a comprehensive and well-reasoned 115-page memorandum. I agree with the judge's careful analysis and conclude that although the defendant presented some new evidence, none of the issues raised "present 'a new and substantial question,'" as required by G. L. c. 278, § 33E. Ambers, supra.

Two of defendant's arguments in his motion for a new trial have been the subject of prior litigation, and despite some new evidence, do not present "new" issues within the meaning of G. L. c. 278, § 33E. First, the defendant's argument that one of the Commonwealth's trial witnesses was a government agent has been the subject of nearly all of the defendant's post-trial

state and federal appellate litigation, much of the newly discovered evidence was inadmissible, and none established that the witness was a government agent. Second, the defendant's argument that the Commonwealth withheld exculpatory evidence regarding the same witness was the subject of his Second and Fourth motions for a new trial, and each time, as here, the Brady argument was cumulative of the "government agent" argument and does not present substantial questions that have not been considered by this court.

Although the defendant's other two arguments in his motion for a new trial had not been previously addressed, they too, failed to meet the requirements of G. L. c. 278, § 33E.[1] First, during discovery for the hearing on the defendant's seventh motion for a new trial, the Commonwealth disclosed that the "trial file" in the defendant's case was missing. As the motion judge found, the defendant failed to present any evidence that the trial file held exculpatory evidence, and there was no evidence that the file was lost as a result of recklessness or

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[1] I decline the defendant's invitation to address the propriety of this court's (1) adoption of the Ninth Circuit's holding in State v. Walther, 652 F.2d 788 (9th Cir. 1981), which expanded the definition of a government agent; (2) creation of a jury instruction regarding the unreliability of jailhouse informants; (3) establishment of a new rule stating that where the Commonwealth is responsible for the loss of its trial file in a first degree murder case (a) the defendant is entitled to an inference of bad faith, and (b) the defendant is entitled to a presumption that the file included exculpatory evidence; and (4) extension the hearsay exception announced in Commonwealth v. Drayton, 473 Mass. 23, 36 (2015), to apply to the defendant's case as a remedy for the missing trial file.

bad faith. Finally, the defendant argues that the motion judge failed to make findings regarding the alleged perjury of the aforementioned witness. The defendant, however, failed to present credible evidence that any such perjury occurred, and if so, such perjury was related to a material aspect of the witness's testimony. The only proven false testimony was related to the witness's past military service, which was immaterial to whether the witness was acting as a government agent when the defendant confessed to his involvement in the murder, or the veracity of his testimony regarding the defendant's confession. Therefore, the judge properly determined that the defendant had failed to raise a new and substantial question necessitating review by the full court. See G. L. c. 278, § 33E.

The defendant's application for leave to appeal is hereby denied.

By the Court:

Geraldine S. Hines
Associate Justice

Entered: August 17, 2017

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 1981-1712/14

COMMONWEALTH

vs.

JAMES RODWELL

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON DEFENDANT'S SEVENTH MOTION FOR NEW TRIAL

(REDACTED)[1]

The defendant ("Rodwell") is serving a sentence of life without parole on a 1981 conviction for first degree murder.[2] Six motions for new trial and extensive habeas corpus litigation in the federal courts have met with failure, all but one without an evidentiary hearing.

In this, his seventh new trial motion, Rodwell has come forward with new evidence from several sources on the issue that has been central to most of the prior motions and, to a substantial degree, the trial itself: Whether Commonwealth witness David Nagle was acting as a government

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[1]The evidence at the hearings on this Motion included documents produced, in partially redacted form, by the U.S. Drug Enforcement Agency. The Court and counsel entered a Protective Order dated May 29, 2014 which provided, among other things, that the parties may reference DEA documents in their filings, but that "[a]ny filing that incorporates direct quotations from the documents or otherwise directly reports the contents of the documents shall be subject to redaction by the Court ...." The original of the decision, denoted "UNREDACTED AND IMPOUNDED / Not to be copied or disseminated by counsel," will be impounded and kept separately from the public file, except that counsel will each receive a copy. This copy of the original, designated as "REDACTED," has been redacted according to the criteria in the Protective Order, and will be placed in the public file. Information from sources other than the DEA file has not been redacted, whether or not it concerns Nagle's DEA connection.

[2]Rodwell was also convicted in the same trial of armed robbery and unlawful carrying of a firearm.

agent[3] when he and Rodwell, both housed at the Billerica jail awaiting trial in different cases, had conversations in which Rodwell allegedly admitted to the murder.

There is a second, somewhat related issue as well: whether the Commonwealth failed in its Brady obligation[4] to disclose the full extent of the promises, rewards and inducements extended to Nagle in exchange for his testimony.

Finally, there is a third issue. Somehow, apparently decades ago, the District Attorney's "trial file" for the Rodwell case disappeared, raising the question of what sanction, if any, the Commonwealth ought to suffer for spoliation of evidence.

After lengthy preliminary proceedings, on August 7, 2015 I allowed Rodwell's motion for an evidentiary hearing on these issues, with an original list of eight witnesses. Ultimately, twenty-nine witnesses would testify (one of them twice), and 148 exhibits would be received in evidence.[5] The passage of nearly thirty-five years has left significant gaps in the historical record: a number of important witnesses have passed away; the memories of others are understandably spotty; and

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[3]"[W]here the government has entered into an 'articulated agreement containing a specific benefit,' or promise thereof, the recipient inmate is a government agent for purposes of the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights even if the inmate is not directed to target a specific individual. Commonwealth v. Murphy, 448 Mass. 452, 453 (2007), quoting Commonwealth v. Reynolds, 429 Mass. 388, 394 (1999).

[4]Brady v. Maryland, 273 U.S. 83 (1963).

[5]The witness list is attached as Appendix A, and the exhibit list as Appendix B. The citation format used herein is as follows. "TTR" refers to the transcript of the Rodwell trial. A name within parentheses, sometimes with a page number and sometimes not ("McDermott, p. 53" or "McDermott") denotes testimony of a witness at the evidentiary hearings conducted before me. "Ex." refers to exhibits submitted by defense counsel in pre-hearing proceedings and/or admitted in the evidentiary hearings; a page number following the exhibit number refers to the "Bates stamp" assigned it by counsel.

documents with possible relevance have disappeared, or have surfaced in unexpected places and without a comprehensible chain of custody.

In the end, the evidence marshaled over portions of sixteen days points – imperfectly, to be sure, but nonetheless convincingly – to the conclusion that although Nagle came forward to law enforcement expecting to swap information for leniency in his own cases, and although he was in fact rewarded generously for his efforts, his conversations with Rodwell were not the subject of a prior agreement or promise; therefore, he was not acting as a government agent. Also, as was determined in a previous motion for new trial (the fourth), the Commonwealth adequately disclosed, before trial, Nagle's role and the promises, rewards and/or inducements coming his way.

Mr. Rodwell's Seventh Motion for New Trial[6] is therefore DENIED.

I. PROCEEDINGS TO DATE

The following facts are drawn from the case file, of which I take judicial notice.

A. The Rose Murder, Pretrial Proceedings, and Trial.

Shortly before midnight on Sunday, **December 3, 1978** one Louis Rose was found dead of gunshot wounds in his car on Garfield Avenue, Somerville, just outside the Apollo Cake Company building. The murder went unsolved for more than two years.

In late April of 1981, however, Francis X. Holmes, Jr., then on parole in Massachusetts, was arrested for a federal offense (interstate transportation of stolen goods). He was arrested on a parole violation and held in the Billerica House of Correction. From there, he contacted the police to say that he had been present at the Rose murder.

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[6]The seven motions were given various titles. I have referenced them here by number as if they had been captioned that way.

Trooper William Powers and Lt. Thomas Spartachino of the State Police (the latter assigned to the Middlesex District Attorney's Office's CPAC investigative unit) met with Holmes at Billerica, and interviewed him. Holmes told them that Rodwell had shot Rose, and provided details. He was placed in the federal witness protection program and, on May 4, 1981, gave Spartichino a stenographically recorded statement. Holmes had his parole restored sometime after this, and was married in June 1981. (TTr. v. 2 pp. 58, 129-32, v. 3)

On **May 22, 1981** Rodwell was arrested for the Rose murder and held at Billerica. (TTr. v. 5, p. 120; Ex. 73 at 1212)

The Middlesex District Attorney brought the case to the grand jury for indictment. Holmes was called before the grand jury in early June, but took the Fifth. On June 15, 1981 he was brought before the Supreme Judicial Court, granted immunity, and returned to the grand jury, where he testified. (TTr. v. 3, p. 58) Indictments issued against Rodwell the same day for murder, armed robbery, and carrying a firearm without a license. He was arraigned in the Superior Court the next day, June 16. (Ex. 44 at p. 905)

Rodwell's trial began with jury impanelment five months later, on November 17, 1981. ADA David Siegel represented the Commonwealth; Atty. William Cintolo, Rodwell; and the Hon. Alan J. Dimond presided. Francis Holmes (who was appointed counsel, exercised his Fifth Amendment right again, and was re-immunized by the trial judge and ordered to testify, Tr. v. 2 pp. 12-30) and David Nagle testified for the Commonwealth at trial, along with Det. Thomas Spartichino and seven other witnesses. Rodwell called three witnesses and testified himself, all as related below.

1. Pretrial Proceedings Involving David Nagle.

On October 21, 1981 Rodwell's counsel filed a Motion to Obtain Information Regarding Informants, Co-Operating Individuals and/or Commonwealth Witnesses (Paper #6), requesting (inter alia) a

> full and complete statement of all promises, rewards, and/or inducements of any kind (particularly, but not exclusively, relating to pending sentences, parole status, places of incarceration, time of incarceration, bail-jumping, future cases), made by the Commonwealth, its prosecutors, its agencies, or its agents, or by any state acting as a result of an explicit or implicit request by the Commonwealth to induce to encourage the giving of testimony or information and made to: (a) any prospective witness whom the Commonwealth intends to call at the trial of the above-captioned matter ....

Also requested was:

> A full and complete statement of any and all criminal cases presently known by the Commonwealth to be pending against any witness the Commonwealth intends to call in its presentation of its case-in-chief at trial of the above-captioned matter, regardless of whether or not these cases are the subject of a promise, reward or inducement.

The Commonwealth responded on November 9 with "Commonwealth's Further Provision of Discovery" (Paper #8; Hearing Ex. 96). There was a lengthy narrative as to Holmes, and the following regarding Nagle:

> No promises, rewards or inducements have been offered or given to Mr. Nagle regarding his testimony. Lt. Spartichino made that clear to Mr. Nagle; however, the lieutenant did tell him that when this case was finished, he (Lt. Spartichino) would write to or inform the District Attorneys of Middlesex and Suffolk Counties of Mr. Nagle's cooperation in the matter. Mr. Nagle has cases pending in these two counties.
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> At the time that Mr. Nagle and Lt. Spartichino first spoke, Mr. Nagle's transfer to the western part of the state (Greenfield) had

> already been arranged by Suffolk officials. He had not been transferred, however, because transportation was a problem. Lt. Spartichino arranged for Mr. Nagle's transportation to Greenfield House of Correction from Billerica.

On November 13, 1981 Cintolo filed a Motion to Suppress Statements of David Nagle, Jr. (Paper #9; Hearing Ex. 68). The theory of the motion was that Rodwell had been arraigned and assigned counsel and had refused to give a statement, and that Nagle "was acting as a Government agent prior to Rodwell's incarceration at Billerica and likewise, was acting as a Government agent during the course of any and all conversations which may have occurred between Rodwell and David Nagle," citing Massiah v. United States, 377 U.S. 201 (1964). The accompanying affidavit of Atty. Cintolo averred that the Suffolk DA had arranged to have Nagle transferred from the Billerica House of Correction to Greenfield. Cintolo believed that this was "because Nagle was a cooperating agent of the Government working on various investigations for them in an undercover manner," and that it was in this capacity that he spoke with Rodwell, "for the sole purpose of attempting to elicit from him incriminating statements to be used at Rodwell's trial."

The Commonwealth's opposition (Paper #13; Hearing Ex. 54) was filed on November 17 – the day the jury was impaneled – and Judge Dimond denied the motion the same day, deeming the affidavit insufficient to warrant an evidentiary hearing. See Commonwealth v. Rodwell, 394 Mass. at 698-99. Cintolo's later attempt, on his cross examination of Nagle, to explore a related issue was rejected by the trial judge. (TTr. v. 4 pp. 147-52; see discussion of cross examination of Nagle, *infra*).

2. Francis Holmes's Trial Testimony.

Holmes, who by the time of trial had pleaded guilty to the federal charges against him and was serving a three-year sentence, testified (in brief summary) as follows. (TTr. v. 2, pp. 57ff.; v. 3, pp. 12-172) In the afternoon of December 3, 1978 he met Rodwell, with whom he was acquainted and for whom he sometimes worked installing aluminum siding, by chance in downtown Burlington. He got into Rodwell's car (a rented Ford Grand Torino, blue), and Rodwell said, "We're going to rip off a dope dealer," meaning Rose, with whom Holmes was also acquainted.

Holmes and Rodwell first drove to Rodwell's Woburn apartment, where they encountered someone named Dapper, whom Holmes had met once. Rodwell and Dapper went into a room and talked, then came out again, Rodwell carrying a .22 pistol. He stowed this in his waistband. The three left between 7:00 and 8:00 p.m. and drove to Rose's apartment, also in Woburn.

On the way to Rose's abode they spotted his car, a Buick, parked outside a house, and stopped to speak with him. After several conversations (apparently concerning a drug deal), all four proceeded in the two vehicles to Rose's apartment, Rodwell repeating several times to Holmes and Dapper that they were going to rip off a dope dealer. When they arrived, Rose went into his apartment, leaving the others in Rodwell's car.

Rodwell grew impatient, and told Holmes to go in and tell Rose to hurry up. As Holmes was getting out of the Grand Torino, however, Rose reappeared, carrying a rifle in a case and a paper bag containing a large jar of percodan pills. Rose got into his Buick; Holmes (at Rodwell's direction) got in with him; and the two cars drove down Rt. 93 to the Mystic Avenue, Somerville exit, Rodwell leading the way. They stopped at the end of Garfield Avenue, and Rodwell told Rose to park behind a nearby building. He did so, then asked Holmes what was going on. Holmes said he'd find out,

exited Rose's car, and went over to the Grand Torino. Rodwell got out and told Holmes, "Get in the driver's side of the Torino and get ready to drive," pulling his coat over the .22 pistol as he spoke. Holmes did as requested.

From the Grand Torino, Holmes saw Rodwell get in the Buick's passenger seat, pull out the pistol, and shoot Rose seven times in the face. Then, Rodwell came back to the Grand Torino carrying the rifle and the jar of percodans, got into the back seat, and told Holmes, "Get out of here." Homes "[b]acked it up and took it out of there" as Rose's Buick rolled toward the building.

At Dapper's suggestion, Rodwell took the wheel. When they got to a bridge, location unknown, they stopped and Rodwell and Dapper threw both guns into the water below. When Holmes expressed the view that "it was crazy, that we were going to get caught because his [Rose's] father was the captain on the Burlington Police Force," Rodwell directed him to "[s]hut up."

They drove to Boston's North End, deposited the percodan jar at Dapper's apartment, went to a bar, and arranged with the bartender ("Kenny") to leave the Grand Torino there and borrow his Jeep Scout. They drove it to an apartment complex in the North End. Rodwell and Dapper went inside; Holmes stayed in the Jeep. When they came out, Rodwell said "that they went in to see a lawyer or bail bondsman or something and be prepared in case something happened," while Dapper helped himself to a couple of percodans from his coat pocket.[7] Rodwell and Dapper spoke with Kenny again while Holmes drank a beer, then Rodwell drove him home. He arrived about midnight or 1:00 a.m., with Rodwell reminding him, as he had advised earlier in the evening, "to keep it to myself."

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[7]Holmes testified that at some point, Rodwell offered him and Dapper percodans. Dapper took some but Holmes did not ("They make me sick"), so Rodwell gave him twenty dollars instead.

When Holmes next saw Rodwell a few days later, Rodwell said that he and Dapper were selling the percodans. Holmes accompanied him to the car rental place, where Rodwell swapped the Grand Torino for a light blue Chevy Malibu. On later occasions when he encountered Rodwell, Rodwell reminded him "that if I kept it to myself, we wouldn't get caught," but if he didn't, "I'd be dead."[8]

Holmes testified that he kept what he knew about the Rose murder to himself for the next two and one-half years. In April of 1981 he was arrested by the FBI for interstate transportation of stolen goods. He made bail, but then was detained on a state parole violation and housed in the Billerica jail. He told a fellow inmate about the murder, and said he would like to contact the police and tell them what he knew.

The inmate recommended that he speak with Trooper William Powers of the Massachusetts State Police, and called him on Holmes's behalf. Powers came to Billerica and met with Holmes. Later, he came back with Detective Spartichino who, in exchange for Holmes's information concerning the Rose murder, promised to put in a good word at Holmes's upcoming parole revocation hearing (but also, according to Holmes, told him he would be arrested and charged with murder). On cross examination, Holmes acknowledged that Spartichino had returned on May 4, 1981 to take a stenographically recorded statement from Holmes concerning the murder. (TTr. v. 3 pp. 77ff; see Ex. 61)

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[8]The defense cross examination did not move Holmes much off the fundamentals of this version of events, but concentrated for the most part on such standard impeachment fare as Holmes's prior convictions; prior statements that differed in details from his trial testimony; promises, rewards, and inducements (immunity and the witness protection program); and a perjurious denial on an application to the National Guard concerning his criminal record.

Holmes had not previously discussed the murder with any law enforcement official. His reason for doing so now was "[t]o get something out of the inside of me that I had been carrying for two years that was slowly, you know, destroying me." (TTr. v. 3 pp. 18-19) When the time came to appear before the grand jury, he "pleaded the Fifth Amendment" on advice of counsel, was granted immunity, then testified. The Superior Court trial judge had granted him immunity the day before concerning his trial testimony. (TTr. v. 3 pp. 27-28)

3. Lt. Thomas Spartichino's Trial Testimony.

Lieutenant Spartichino testified on Day 4. (TTr. v. 4 pp. 53-105) He chronicled generally the investigation into the Rose murder, which was "open and unsolved" with no suspects until May 1, 1981, when he and Tpr. Powers interviewed Francis Holmes, at Holmes's request, in Billerica. He went back and took a stenographically recorded statement on May 4, then obtained a warrant to arrest Rodwell, which was executed on May 22. Spartichino's testimony concerning his dealings with Holmes matched Holmes's closely, including his statement that Holmes would probably be charged with murder or as an accessory; that he made no promises to Holmes other than to report his assistance to the Board of Probation, "to the full board, if necessary"; and that Holmes's parole was never revoked.

Spartichino also testified that within two days after the May 4 interview and based on information from Holmes, he had three MDC police divers search the waters near the Wellington Street bridge in Somerville, but nothing was found. On August 26, 1981, following up on a tip "from a Mr. David Nagle," there was a second search by divers near the North Washington Street Bridge connecting the North End to Charlestown, looking for the .22 pistol and the rifle; this, too, was unfruitful. (Nagle, who had not yet testified, received no further mention on Spartichino's direct

or cross.) Finally, Spartichino testified that "Dapper," who had lived in the North End and whose real name was Anthony Corlito, was deceased.

The cross examination wandered a bit, but emphasized that the Wellington Street and North Washington Street bridge searches yielded nothing (inferentially discrediting Holmes and Nagle), and at elicited some prior inconsistent statements of Kevin Farrell (see below). Attempts to elicit hearsay testimony concern ing Rose's narcotics purchases and a ransacking of his apartment after the murder were excluded.

4. David Nagle's Trial Testimony.

Next on Day 4 (November 20, 1981), the Commonwealth called David Nagle. (TTr. v. 4 pp. 108-204) Nagle testified that he had served "almost three years" in the Marines and was honorably discharged in 1970 with the rank of sergeant.[9] Since then, he had worked in construction and had been regularly in trouble with the law. Atty. Siegel elicited the details in the form of Nagle's convictions and incarcerations from 1972 through 1980. (TTr. v. 4 pp. 108-13)

Nagle testified that he was presently in custody on pending charges in Suffolk and Middlesex Counties.[10] He was housed in the Franklin County of Correction in Greenfield, having requested this of the Suffolk DA's office, partly because his family lived out there and partly for his safety. From April 22 until July 14, 1981, however, he had been in Billerica, where he met Rodwell on the 22nd or 23rd of May. They were introduced in the gym by another inmate, Richie Scala. (TTr. v. 4 pp. 113-15)

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[9]The honorable discharge was false. See Ex. 74 and findings *infra*.

[10]As he had with Holmes, the prosecutor elicited early on in Nagle's testimony an enumeration of his prior convictions, which were numerous, dating from 1972 when Nagle had been discharged from the Marine Corps "with a real bad drug habit."

From then until July 14, when he was transferred to Greenfield, Nagle was "kind of tight" with Rodwell, whom he identified in the courtroom for the jurors. They were housed on the same cell block but were out of their cells four to five hours a day. Together, they hung out with a small clique of other inmates, including Scala Johnnie ("Putter") Reeder, Tommy Farina, and sometimes Bobby Trenholm. (TTr. v. 4 pp. 115-17)

Nagle testified that beginning "maybe a week, ten days after he came in," "maybe the first week in June," Rodwell "[q]uite often" discussed his case with him, alone and in the company of Scala and/or Reeder. Asked if he was in contact then or before "with any police officer associated with the Rodwell murder case," Nagle said "No, I wasn't." (TTr. v. 4 pp. 117-19)

On the first such occasion, when the two were leaving the cell block together, Rodwell volunteered that he was charged with the Rose murder, and supplied some details (that Rose "was the chief of police's son from Burlington"; the crime was "a drug rip-off" involving percodan; Frankie Holmes and someone named Dapper were present; it took place on a rainy night; and

> He said they pulled over to Garfield Ave. and pulled up. Rose's car was in the head and the car that Jimmy Rodwell was in pulled up behind him. And that Jimmy Rodwell got out of his car and got into Rose's car.

Then, said Rodwell, "'I put seven in his head and I didn't hesitate.'" He came away with the pills, "a sum of money and also a rifle." His plan all along was to "take him off all the way," meaning to rob and kill Rose. Rodwell added that he didn't think Holmes had actually seen the shooting, but he could have heard the shots. (TTr. v. 4 pp. 120-26)

They left Rose in his car with the lights on and engine running and "drove over to the North End, over to the North End Bridge and got rid of the pieces"; i.e., "they threw the guns in the water."

"Grinning and laughing," Rodwell said the state police had sent divers to look, but they hadn't found the guns and never would, "with all that steel down there." (TTr. v. 4 pp. 127-28)

From there, they "went to see a lawyer by the name of Feinberg," got rid of the car, and went to a bar named "The Brother in Law's." Asked if he was rattled at the time, Rodwell replied, "'No, I just put seven in the kid and I'm having a few drinks. I was cool as a cucumber,' those were his words. ... Rodwell said that Holmes was more rattled than he was."[11] (TTr. v. 4 pp. 128-29)

Nagle said he knew Frankie Homes "fairly well" and had talked with him in Billerica "many times," but never about Rodwell or the Rose murder; in fact, Holmes was gone from Billerica by the time Rodwell arrived. (TTr. v. 4 pp. 129-30)

In early June – "the 7th, 8th, somewhere, I don't know – the 10th, somewhere around there – The beginning, not late" – Rodwell came back from a hearing in the Somerville District Court, where he had learned that the government was "going for a direct indictment against him" and had granted Holmes immunity. "He said the whole case hinged on Frankie Holmes' testimony and that he had to destroy his credibility and his testimony." Rodwell asked Nagle – again, in the company of Scala and Reeder – to come to court, testify against Holmes, "and say that Frankie Holmes was walking around saying, 'I was involved in a murder case, and I don't care who I blame it on, I'm going to make a deal to get out on it.'" Nagle, concerned for his safety, pretended to go along, but had no intention of "get[ting] involved in perjury in a capital case." (TTr. v. 4 pp. 133-36)

Nagle also testified that Rodwell "wanted to find out where Frankie Holmes was, so that he could have him whacked out," mentioning "[t]hat he had friends that could follow his mother and

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[11]Nagle testified that he also met Holmes during his Billerica stay and talked to him "many times," but never about the Rose murder. He said that Holmes had left Billerica by the time of his (Nagle's) first discussion of the murder with Rodwell.

father, to find out where the Federal Marshals had Frankie hidden." When Nagle asked why he had let Holmes live on the night of the Rose murder, Rodwell "said that Frankie Holmes was deathly afraid of him and he wouldn't step out of line." (TTr. v. 4 pp. 137-39)

The last time Nagle spoke to Rodwell was at the end of June, when they were both in lockdown following a fight with some other inmates. Rodwell's cell was "right across from [Nagle's] – a couple of doors up." Rodwell opined to Nagle that they would "probably go to the hole" following their disciplinary board hearing the next day, but "'They don't know what an animal I am. I put seven in the kid's fuckin' head.'"[12] (TTr. v. 4 pp. 139-10)

The first time he spoke with a law enforcement official and told what he knew concerning the Rose murder, Nagle testified, was July 9, 1981, when Spartachino came to Billerica to speak with him. Nagle had arranged the meeting through Sgt. William McDermott, "a mutual friend of mine and [Spartachino's]." He came forward because Rodwell had tried to recruit him to discredit Holmes by giving false testimony and he knew that perjury in a capital case could get him a life sentence, "and, also, the lieutenant could speak on my behalf ... on the cases I had pending against me." Asked if Spartachino had promised or offered anything in exchange for his statement or his testimony, Nagle said "No, he was quite emphatic about that – no promises. He said he would speak on my behalf, and write a letter" concerning Nagle's cases – four armed robberies in Suffolk county and two more in Middlesex. Spartichino did not promise any particular outcome or disposition. (TTr. v. 4 pp. 119, 141-44)

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[12]According to Nagle, Rodwell did go to the hole, but the disciplinary board found Nagle not guilty.

On cross examination, Nagle testified that the pending cases against him were four armed robberies in Suffolk County and two in Middlesex, one of which also included a charge of kidnapping. He was arrested on warrants at some point, and was held in Billerica beginning April 22, 1981 (having been there once before on another case). He had not spoken to the DA but had met once on May 18 or 19, 1981 – a few days before he first met Rodwell – with Detectives Rufo, Kilroy, and Cucuzzo, who were handling the Suffolk cases. (TTr. v. 1 pp. 144-47, 149-50)

The judge at sidebar excluded further inquiry on this subject. The issue, as Atty. Cintolo presented it, was whether a civilian who had acted as a government agent in the past "and was acting with the intention of whatever information he found out of giving it to the authorities" should be deemed a government agent for Massiah purposes. Judge Dimond expressed skepticism toward the theory, observing that the case Cintolo had proffered was decided under the Fourth Amendment, not the Sixth,[13] and ruling that the proffered facts were "insufficient ... to warrant such an inquiry and, in any event, [it] should have been the subject of a pretrial motion."[14] (TTr. v. 4 pp. 150-52)

Continuing: Cintolo established that Nagle had first met Rodwell between May 22 and 24, and that the last time they discussed his case was "the night before the D Board" in late June. He first met Spartichino on July 9 or 10; he left Billerica on July 14; he met Spartichino again in

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[13]The case was United States v. Walther, 652 F.2d 788 (9th Cir. 788 (1981). There, the court affirmed the district court's suppression of a quantity of cocaine, discovered in a warrantless search by an airline employee who had served in the past as a paid confidential informant for the DEA, and "was never made aware that his file had been closed." Noting that "two of the critical factors in the 'instrument or agent' analysis are: (1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search," and that both were present, the Court of Appeals endorsed the district court's finding that this was a "governmental search," not private action immune from constitutional constraints.

[14]In fact there was such a motion, albeit filed belatedly on Friday, November 13, 1981. The jury was impaneled on Tuesday, November 17,

September, when he gave his stenographically recorded statement; and he last saw him "a couple of weeks ago." Shown the transcript of the statement, Nagle acknowledged it was taken on August 6, 1981, in the Greenfield House of Correction chapel. (TTr. v. 4 pp. 152-56)

Nagle testified that the transfer to Greenfield was something he had requested around May 18 or 19 in order to be closer to his family; that there was a problem with transportation; but that Spartichino "said that transportation would be provided" and it was, a few days after their first meeting. (TTr. v. 4 pp. 162-64)

Cintolo also explored Nagle's contacts with Holmes, who had arrived at Billerica shortly before Nagle did. Both were housed at the beginning in the infirmary and later, on the same cellblock. Nagle learned from another source (Scala) that Holmes was "involved" with Rodwell and would be testifying against him. (TTr. v. 4 pp. 165-66)

After Holmes left, Nagle began socializing with Bob Trenholm. For reasons that would become apparent in the defense case (see *infra*), Cintolo had Nagle repeat that some of Rodwell's statements concerning the murder, and the plan to discredit Holmes, had been made in the presence ot Richie Scala and Putter Reeder, and elicited details concerning when and where. (TTr. v. 4 pp. 168-70)

Next, Cintolo tried to show that details that Nagle had attributed to Rodwell's boasting about the murder had come from other sources. An attempt to demonstrate that Nagle knew Rodwell drove a Cadillac because he had a view of the prison lot where visiting family members parked fell flat. (TTr. v. 4 pp. 170-73) He reminded Nagle that he had told Spartichino that Rodwell had said, "Look how stupid they are. I was stopped for speeding right after the murder occurred," then showed him a Boston Herald American article on the subject, which Nagle denied having read. (TTr. v. 4 pp.

174-77) Nagle did admit familiarity with the North End bridge where he claimed Rodwell had told him he had disposed of the murder weapon, because he had worked there. (TTr. v. 4 pp. 178-85) He also admitted that he had forgotten the name of the North End nightclub (Brother-In-Laws) where Rodwell, Holmes and Dapper had gathered until Spartichino suggested it to him in the transcribed statement. (TTr. v. 4 pp. 184-88)

Finally, Cintolo planted the suggestion that Spartichino had rescued Nagle from a stint in solitary confinement (the "Hole") on account of a fight, and closed as the transcribed statement had:

> Spartichino: Is there anything that I haven't asked you that pertains to this case that you want to tell me, or I should know?
>
> Nagle: No, just that, I mean, we're all in this together.[15]

(TTr. v. 4 p. 200)

5. The Other Trial Testimony.

Holmes provided the only eyewitness testimony to the Rose murder, and Nagle the only testimony concerning admissions by Rodwell. The jury also heard testimony in the case in chief from:

- Robert Robichaud, the man who found Rose's Buick on Garfield Avenue (TTr. v. 3 pp. 174-86);

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[15]ADA Siegel did a brief redirect, in which Nagle testified that he didn't go to the hole because the D Board found him not guilty; he had "[n]ever in my life" met Spartichino before his July visit to Billerica; that he sought a transfer to Greenfield both to be near his family and for his safety; he never discussed the Rodwell case with Holmes, and that Holmes had not told him what kind of car Rodwell drove; and that Rodwell had mentioned the North End bar by name and all Spartichino did was refresh his memory. (TTr v. 4 pp. 200-04)

- Robert Hamilton, the Somerville police officer who responded to Robichaud's call and found Rose's body in the Buick (TTr. v. 3 pp. 187-97);
- Dr. George Katsas, the medical examiner who performed the autopsy (TTr. v. 4 pp. 3-24);
- Kevin Farrell, who saw the Grand Torino, the Buick, and their occupants outside Rose's apartment building on December 3, 1978 and who had seen the Buick operator before, but did not know him or the others, and gave descriptions of two of the Buick driver (who was carrying a rifle case) and one other man, but did not make an identification (TTr. 4 pp. 25-52);
- James McGuinness, a ballistician who testified that seven cartridge casings found in the Buick were .22 caliber; and that they and projectiles recovered from Rose's head were all fired by and from "the same unknown weapon," a .22 semiautomatic pistol; and (based on a certificate from the Firearms Records Bureau) that Rodwell did not have an FID card or a license to carry (TTr. v. 5 pp. 8-25);
- Carl DeStefano, the owner of a body shop and car rental business, who testified that Rodwell rented a blue Chevy Malibu on December 1, 1978; swapped it the same day for a blue Ford Grand Torino; and towed in and swapped back to the Malibu on December 5, the Grand Torino being in need of battery cables and radiator work and "right side smashed" (TTr. v. 5 pp. 26-44); and
- Atty. Ira Feinberg, who testified that he had represented Rodwell; that Rodwell was often at his house in the North End and sometimes did carpentry work there; but he

didn't recall him being there on December 3, 1978, or on any occasion between 11:00 p.m. and 1:00 a.m. (TTr. v. 5 pp. 72-76)

The defense called three witnesses in addition to Rodwell himself:

- Richie Scala and "Putter" Reeder each stated, contrary to Nagle's testimony, that Rodwell did not discuss his case, or confess to the Rose murder, in their presence. Scala additionally testified that Rodwell never asked him to testify falsely to discredit Holmes. (TTr. v. 5 pp. 79-98)
- John Rodwell, Rodwell's father, testified that at the time of the Rose murder, Rodwell was living with him in a one-bedroom apartment in Woburn. There were no guns in the apartment. The father was working as an industrial engineer and taking courses toward an MBA at Suffolk University. On Sunday, December 3, 1978 he was cramming for final exams in the week to follow. He did not leave the apartment all day, and he "had no visitors" - not Anthony "Dapper" Colito, and not Frankie Holmes, who worked with Rodwell, came by frequently, and sometimes borrowed Rodwell's car. On cross examination he admitted that he hadn't thought about the events of that day until his son was arrested, two and one-half years afterward. (TTr. v. 5 pp. 99-110)

Rodwell was the last witness in the case. (TTr. v. 5 pp. 112-150) He testified on direct that he knew Frankie Holmes, an acquaintance from the coffee shop in Burlington and occasional employee, and Louie Rose, a friend he met at the coffee shop. He denied ever having owned a gun. He did not see Holmes or Dapper Colito on December 3, 1978. At the time, he was doing carpentry work at Atty. Feinberg's apartment, but he was never there after 6:00. He never socialized with

Holmes and was never with him at the Brother in Law's bar. He didn't shoot and kill Rose, didn't take a rifle or a jar of pills from him, wasn't at Garfield Avenue on the night in question, and wasn't driving the Torino at the time. He had rented it in late November or early December and took it back on December 5, because "[i]t wouldn't run," not because it had been used in a murder.

Rodwell testified that he had been housed at Billerica since about May 26, 1981, the Memorial Day weekend. He met David Nagle there for the first time, and started hanging around with Nagle, Reeder, Scala, and Farina. Nagle "asked me a lot of questions," but Rodwell never told him he had killed Rose, or that he was an animal and had put seven in the kid's head, and never asked Nagle to perjure himself.

On cross examination, Rodwell was impeached with convictions for larceny over $100, receiving stolen property, uttering counterfeit bills (x4), conspiracy to utter counterfeit bills, and a Class D narcotics offense, all from 1975 - 1977. He denied having discussed his case with anyone at Billerica and specifically, with Scala, Reeder, or Nagle, and denied every particular of Nagle's testimony that the prosecutor asked him about. "I didn't do the crime," he said; "why should I discuss it with anybody?"

He heard that Holmes had been granted immunity, but "[i]t didn't affect me. He had enough of his own problems. ... I did not give it a second thought," even when he learned Holmes was going to testify against him, and he didn't try to find ways to discredit Holmes or have him killed. He didn't remember where he was or who he was with on the night of the murder, but "I know I wasn't in Somerville on Garfield Ave., I know that much." He did recall that he wasn't at home with his father. He wouldn't have driven the Torino for pleasure, but usually got around "with my fiancee."

The next day, November 25, the jury returned a verdict of guilty. He was sentenced to life without parole on the murder charge, fifteen to twenty years for armed robbery, and three to five years for unlawfully carrying a firearm, the latter sentences to run concurrently with the first.

B. Post-Trial Procedural History.

1. The First Motion for New Trial, and Direct Appeal (1983-85).[16]

Rodwell filed a timely notice of appeal on December 16, 1981, and represented by new counsel (Bernard Grossberg), filed his first Motion for New Trial on January 7, 1983. The motion alleged that Atty. Cintolo had been ineffective in various respects, including a "fail[ure] to investigate the issue of David Nagle's work or other actions as a government informer or agent." (Ex. 5)

The SJC, which had not yet heard the direct appeal, ordered that the new trial motion be heard in the Superior Court. Judge Dimond, the trial judge, denied Rodwell's motion for an evidentiary hearing. On January 3, 1984, he filed a concise Memorandum of Decision and Order, denying the new trial motion. (Ex. 6)

The SJC affirmed the denial of the new trial motion and affirmed the convictions on direct appeal. Commonwealth v. Rodwell, 394 Mass. 694 (1985). In its decision, the court "consider[ed] first Rodwell's argument that Nagle was acting as an agent of the Commonwealth so that Nagle's testimony concerning Rodwell's statements to Nagle should have been suppressed." Id. at 698. It upheld Judge Dimond's rulings denying the new trial motion without an evidentiary hearing, agreeing with him that the affidavit supporting motion to suppress Nagle's testimony "presented no

[16]In each of his new trial motions, appeals, and habeas corpus petitions, Rodwell had been represented by counsel.

significant facts in support of the claim that Nagle was a government agent" and that the issue "was one that should have been raised by a proper pretrial motion rather than before the jury." Id. at 698-99. It rejected as well the argument that the trial judge improperly excluded evidence (in the form of "past favors" by law enforcement) relating to Nagle's bias. It reasoned that "the pendency of criminal charges is a much stronger source of human motivation" than is "gratitude for past benefits," and noted that "the pendency of seven serious criminal charges against Nagle was fully disclosed to the jury." The trial judge, therefore, had discretion to exclude the rest as cumulative. Id. at 699-700.

2. The Second Motion for New Trial (1986).

On March 20, 1986 new counsel (Matthew Feinberg) filed a second motion for new trial, again premised on the issue of David Nagle as government agent. With it was an affidavit of a retired Boston P.D. detective named Thomas Moran, averring that "[f]rom 1974 until 1981, when I retired, any time David Nagle was arrested in Boston, he would provide information in order to receive preferential treatment," and providing details. Nagle had served as an informant to detectives in Boston (Doris, Hughes, and Manfra), Brookline (McDermott), Cambridge, Somerville, "the Massachusetts State Police, the United States Drug Enforcement Agency, and the Boston Police Drug Unit." Moran himself, however, "never trusted any information from David Nagle as the basis for an arrest or search warrant unless it could be corroborated by another person." (Ex. 8)

Also included with the motion was a transcript of testimony by DEA Special Agent Edward O'Brien from a 1984 federal trial for which Nagle had provided information and in which he ultimately testified (United States v. Quinlivan, discussed *infra*; see Ex. 81), and evidence that while he was in the Norfolk House of Correction in Dedham between 1974 and 1976, Nagle had received

23 visits from Boston, Brookline, Watertown, and Dedham police officers; agents of the FBI and the U.S. Treasury; and (once) a Norfolk County ADA. (Ex. 9)

In a Memorandum of Decision dated April 30, 1986, Judge Dimond denied the motion, ruling that the detective's affidavit and Special Agent O'Brien's testimony

> are only cumulative of evidence previously considered at the pretrial hearing and on the defendant's first motion for a new trial. And, as already observed, nothing in the allegedly new evidence relates to the incarceration of Nagle and the defendant in the Billerica House of Correction, where the defendant's incriminating statements were made.

(Ex. 10) A single justice denied Rodwell's application for leave to appeal.

3. The First Petition for Writ of Habeas Corpus (1987).

Thereafter, Rodwell filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts, again asserting that David Nagle had been an undercover government agent when he and Rodwell were housed together. Judge Young denied the motion (Ex. 12, pp. 252-58) and was affirmed by the Court of Appeals for the First Circuit, which found that his pretrial motion to exclude Nagle's testimony did not "not show that the state put Nagle into jail in order to question Rodwell," or that there was "'knowing exploitation by the State of an opportunity to confront the accused without counsel['s] being present.'" Rodwell v. Fair, 834 F.2d 240, 241 (1st Cir. 1987) (citation omitted).

4. The Third Motion for New Trial (1993-94).

The third new trial motion, titled Defendant's Motion for Post Conviction Relief, was filed by Atty. Dana Curhan on August 6, 1993. Although the motion argued that Rodwell had been convicted on "highly suspect testimony" provided by Holmes and Nagle (the latter referred to, not

inaccurately, as "a paid professional stool pigeon with a long history of informing for various law enforcement agencies"),[17] it did not revisit the issue of government agency. Instead, the motion focused on a Somerville police report, authored by Det. Sgt. John T. O'Connor, of an interview of one Charles V. Ryan, who said he had information concerning three murders committed in or near Somerville. The third was the Rose murder, and according to Ryan, "he was present when Robert 'Bobby' Winfield shot the victim." (Ex. 12, p. 211)

Judge Dimond having retired, the motion was referred to Judge Sosman. She held an evidentiary hearing at which both O'Connor and Ryan testified, the latter from a hospital bed. Ryan testified that he did not recall speaking with O'Connor (but did not deny that he had), or witnessing the murder, or where he was on the night in question. He said he had been a heavy drinker and narcotics abuser from the early 1970s until recently, and speculated that he might have heard about the shooting in a bar or read about it in a newspaper. "He did not recall where was the night of he Rose murder, and observed that he would not remember where he had been if he had been drinking. He testified that he did not know Louis Rose, Francis Holmes or defendant Rodwell" but that he had grown up with Winfield, a drug user who had since died in a car accident. (Ex. 90, p. 1840)

This left Rodwell's counsel in the unenviable position of asking the judge to admit and credit Ryan's earlier, out-of-court statement to O'Connor. (See Ex. 12, p. 263; Ex. 90, pp. 1841-44) She

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[17]In support, the motion papers included articles from the Valley Advocate, the Boston Phoenix, and Boston Magazine, all of which liberally quoted Nagle's numerous detractors and one of which – the Valley Advocate – reported on the August 1989 arrest of one of Nagle's DEA handlers (Special Agent Edward O'Brien) at Logan airport carrying two suitcases containing 62 pounds of cocaine. (Ex. 12, pp. 245-47) (O'Brien would later enter a guilty plea and begin serving a sentence of six years in a federal penitentiary.)

declined, ruling instead that the Ryan evidence was unreliable and did not cast real doubt on the justice of the conviction, and denied the motion on February 16, 1994. She added:

> To the extent that the motion for new trial raises further arguments about the bias of Nagle, that issue has already been addressed in the defendant's prior appeal and does not form the basis for a new trial. The exclusion of evidence about Nagle's prior cooperation with the prosecution has already been upheld as cumulative, inasmuch as Nagle's bias stemming from then-pending charges was effectively admitted. (Ex. 90, p. 1844)

Judge Sosman therefore denied the motion on February 16, 1994. A single justice denied leave to appeal in June, 1994. (Ex. 13, p. 314)[18]

5. The Fourth Motion for New Trial (1997).

On February 24, 1997 Rodwell, now represented by Kevin Reddington, filed his fourth motion for new trial. This took a somewhat broader approach than its predecessors, and argued (among other things) that the Commonwealth had withheld exculpatory evidence. This related primarily to Nagle's criminal record, his history as a government informant, and "promises and inducements" given for his trial testimony. Judge Barton endorsed the motion, "The Court refuses to act as motion raises no question which could not have been raised in original motions for new trial and appeals." (Ex. 14, p. 290)

The order was affirmed, with somewhat more analysis, by Justice Marshall sitting as single justice of the SJC. In her summary, she noted that the motion was supported by affidavits, (a) of a television researcher who had records of a bail hearing in June, 1981 in which Nagle's counsel represented that he had provided "a great deal of information" to law enforcement authorities in

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[18]The Winfield theory was apparently resurrected with an affidavit from a new witness in 2000. (Ex. 91). It is unclear whether the affidavit was ever put to use.

Suffolk and Middlesex Counties; (b) of a newspaper reporter who believed that after he spoke to the police about the Rose murder, Nagle's bail was "reduced dramatically" and he was transferred to a jail in Franklin County; (c) of a former Suffolk ADA (Robert Nelson, the prosecutor in Nagle's 1981-82 Suffolk cases), who recalled that a lieutenant of the State Police arrived unannounced at Nagle's sentencing and addressed the judge at sidebar, and that Nagle then received a sentence "notably shorter" than the Commonwealth recommended, and (d) a private investigator who had interviewed Charles Ryan in February, 1996 – more than two years after the evidentiary hearing before Judge Sosman – who said he still didn't recall being present at the Rose murder or speaking to Detective O'Connor. From the sum of these parts and a review of the trial evidence, Justice Marshall concluded that the motion did not "present[] a new and substantial question which ought to be determined by the full court." G.L. c. 278, §33E. (Ex. 14, pp. 491-99)

6. The Fifth Motion for New Trial (1998-2000).

On June 9, 1998 Atty. Stephanie Glennon, an associate of Atty. Reddington, filed a fifth motion for new trial. In contrast to its predecessors, this motion was addressed primarily to the judge's charge to the jury, but argued additionally that if the jury had convicted on felony murder alone, the armed robbery and murder convictions were duplicative,[19] and several assertions of prosecutorial misconduct. The name "Nagle" was not mentioned.

The motion was referred to Judge Barrett, who wrote on August 6, 1998, "I execute my discretion and refuse to consider the issues raised by this motion. All of these issues could have been raised in the appeal and the previous numerous motions for new trial." (Ex. 16, p. 540)

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[19]The jury was instructed on two of the three theories of first degree murder – deliberate premeditation and felony murder – and the verdict slip did not ask the jury to specify what theory(ies) had been proven.

Rodwell again sought leave to appeal. Justice Marshall again drew the assignment, and permitted the appeal to go forward solely on the issue of whether the sentences for armed robbery and murder were duplicative. (Id., pp. 541-59) It was argued to the full court which, in a rescript opinion dated July 28, 2000, dismissed the appeal as waived because the duplication issue had not been raised in the fourth motion for new trial, and as moot because Rodwell had completed his armed robbery sentence. Rodwell v. Commonwealth, 432 Mass. 1017 (2000).

7. Further Habeas Corpus Litigation (1999-2001).

On July 6, 2001 Atty. Reddington filed a "Motion to Re-Open Petition for Habeas Corpus" in the federal district court for the District of Massachusetts, asserting (in the court's paraphrase) "that newly discovered evidence reveals that he is actually innocent of the crimes of which he was convicted and that his conviction is constitutionally infirm," the latter argument again raising the Nagle issue.

Judge Young again denied relief, ruling that this was in effect a second petition for writ of habeas corpus and so was circumscribed by 28 U.S.C. §2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which requires that claims formerly brought before the federal court are to be dismissed and new claims litigated only with authorization from the Court of Appeals. He noted that Rodwell had sought and been denied such authorization in an unpublished decision by the First Circuit dated November 4, 1999, such that "further solicitation by Rodwell of the First Circuit for an order authorizing this Court to consider his petition would likely prove fruitless." Rodwell v. Pepe, 183 F. Supp. 2d 129, 134 (D. Mass. 2001).

Rodwell appealed, and the First Circuit affirmed, treating the matter as one of subject matter jurisdiction. The court, however, "add[ed] a coda":

> We acknowledge that, despite the petitioner's numerous attempts to expose the full extent of the relationship between Nagle and the state prosecutor, no court has exhaustively addressed that claim. Some of these lost opportunities may fairly be attributed to procedural errors on the petitioner's part. Others, however, are linked to the stringent filters that channel consideration of habeas corpus claims under the AEDPA. This regimen, though harsh, dovetails with Congress's intent ... "to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation."

Rodwell v. Pepe, 324 F.3d 66, 72 (1st Cir. (2003).

8. Intervention in the Nagle Cases, and Sixth Motion for New Trial (2004-07).

On December 8, 2004 Atty. Reddington filed a motion on Rodwell's behalf, seeking to intervene in one of David Nagle's Suffolk cases in order to unseal and unimpound the transcript of plea proceedings before Judge McGuire on October 2 and 4, 1985. The goal was to determine whether there was evidence that Nagle "did, in fact, receive a promise, reward or inducement as a result of his anticipated and subsequently produced testimony" in the Rodwell trial. Judge Ball allowed the motion on December 31, 2004. (Ex. 17)

On April 12, 2005 Reddington filed a second motion to intervene in a Nagle case in Suffolk County, titled "Motion for Post-Conviction Relief" but seeking an order for "termination of any attorney-client privilege that would prevent" discovery in the files of the Committee for Public Counsel Services, whose predecessor entity (the Massachusetts Defenders Committee, or "Mass. Defenders) had represented Nagle in his 1981-82 Suffolk and Middlesex cases, of any promises, rewards or inducements extended to Nagle in connection with his testimony against Rodwell. Judge Hinkle denied the motion with a margin endorsement fated February 2, 1006. (Ex. 18, 19)

A similar motion was filed in the Rodwell case on October 2, 2006, also titled "Motion for Post-Conviction Relief," and again seeking a court-imposed waiver of Nagle's attorney-client

privilege. Judge Zobel, after a non-evidentiary hearing, issued a three-page memorandum. This canvassed, albeit briefly, the various prior efforts to obtain relief in the Massachusetts and federal courts, and "set aside the ... question whether a court has the authority to order an attorney to disclose – without authority from the client – communications and materials otherwise privileged." Judge Zobel noted that "[n]othing prevents Defendant, through counsel, from obtaining Nagle's waiver of the privilege," yet there was no indication that the request had been made. The order, therefore, was: "Court declines to act." (Ex. 20, 21)

9. The Seventh Motion for New Trial (2013-16).

On August 19, 2013 Rodwell, now represented by Veronica White, Esq., filed a seventh Motion for New Trial. The theme was, once again, David Nagle; the theories, that newly discovered evidence demonstrated (a) that Nagle was in fact a government agent at the time of his conversations with Rodwell, and (b) that the Commonwealth withheld exculpatory evidence concerning promises, rewards and inducements extended to Nagle.

The motion papers reflect a careful, creative, and exhaustive search for, and examination of, such evidence as remains on these issues. Several witnesses who had dealt with Nagle back in the day were interviewed and affidavits were secured. There are transcripts of two federal trials – United States v. Quinlivan, which played a role in the Second Motion, and United States v. Mourad (1983), which was new – in which Nagle (Mourad) or his DEA handler (Quinlivan) testified about his history as a government informant in various matters, including (in Mourad) the Rodwell trial.

Nagle himself – then suffering from end-stage liver failure, and represented by counsel – gave Atty. White a recorded interview from his bed at Bridgewater Hospital. He also agreed in writing to waive the attorney-client privilege, effective at the time of his death. After Nagle died

on December 18, 2012, therefore, his attorneys at Mass. Defenders and its successor, the Committee for Public Counsel Services, supplied affidavits and turned their files over to Atty. White.

After the motion was filed and with the cooperation of the Commonwealth, additional evidence was gathered, most notably the DEA's file on David Nagle. The DEA supplied a substantially redacted copy, which was impounded with copies made available to counsel on both sides. Judge Tuttman, who originally had this motion, viewed the original file in the DEA's Boston office to ensure that documents potentially relevant to this motion were provided and that the redactions did not conceal relevant and material evidence. After Judge Tuttman recused herself from the matter on July 14, 2014 and assigned me to the case, I made two visits to the DEA office for the same purpose. The DEA has since provided a second copy of one of the documents with certain redactions removed, and a clearer copy of a second document.

It took longer than expected to work through discovery and other issues, one of which involved the loss of the District Attorney's original "trial file" in the Rodwell case. On August 7, 2015 I issued an Order for Evidentiary Hearing, authorizing testimony of eight witnesses from Rodwell's considerably longer list of persons who appeared to have information concerning David Nagle or the looming spoliation issue. I agreed to consider the request for additional witnesses as the evidence unfolded.

As it developed, the evidentiary hearings spanned sixteen days or partial days, beginning September 8, 2015 and concluding on February 29, 2016, in which twenty-nine witnesses were heard from. Most of the exhibits proffered by Rodwell in connection with his request for an evidentiary hearing were admitted into evidence (some for limited purposes); some were not; and

a number of additional exhibits were proffered and admitted during the hearings. A list of witnesses is attached as Appendix A, and an exhibit list as Exhibit B.[20]

Necessarily missing from the exhibit list are several key figures; most notably, David Nagle and Lt. Thomas Spartichino, both of whom were deceased by the time this motion was, or could be, filed. Both – but especially Nagle – have left behind written or recorded statements concerning Nagle's role in the Rodwell case and the issue of government agency. There are also contemporaneous records by others on this and related subjects. Many present issues under the rule against hearsay, which I have navigated as best I can.

II. PROCEDURAL AND EVIDENTIARY MATTERS

A. Posture of the Case.

Because this is Rodwell's seventh motion for new trial, and the issue of Nagle as government agent was litigated and rejected at trial and in four of the preceding six new trial motions, the viability of present motion depends on whether the evidence presented qualifies, at least in substantial part,[21] as newly discovered evidence.

> "A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction. ... The

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[20]There are gaps in the numbering of the exhibits, chiefly because not all of the pre-hearing exhibits were admitted into evidence, but it nonetheless seemed most convenient to retain the original numbering. Also, the late (January 2016) discovery of a serious chain of custody issue, regarding certain documents purportedly from the Somerville Police Department's files, caused many documents that were originally admitted by agreement to be excluded.

[21]I have assumed here that the discovery of new, material, and previously unavailable evidence reopens the door to consideration of other evidence on the same issue that was discovered earlier, but was ruled insufficient on its own. I know of no caselaw on this question, but I have considered the totality of the admissible evidence, new and old, on the government agent and *Brady* issues.

> evidence said to be new not only must be material and credible ... but also must carry a measure of strength in support of the defendant's position. ... Thus newly discovered evidence that is cumulative of evidence admitted at the trial tends to carry less weight than new evidence that is different in kind. Moreover, the judge must find there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial. ... The motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations. ... This process of judicial analysis requires a thorough knowledge of the trial proceedings .. . and can, of course, be aided by a trial judge's observation of events at trial ....
>
> "Not only must the allegedly new evidence demonstrate the materiality, weight, and significance that we have described, but it must also have been unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial (or at the time of the presentation of an earlier motion for a new trial). ... The defendant has the burden of proving that reasonable pretrial diligence would not have uncovered the evidence."

Commonwealth v. Weichell, 446 Mass. 785, 798-99 (2006), quoting Commonwealth v. Grace, 397 Mass. 303 , 305-306 (1986).

The following evidence presented in connection with the Seventh Motion was previously unavailable.

1. Affidavits, "running sheets," and selected file materials of one present and three former attorneys with the Massachusetts Defenders Committee (now the Committee for Public Counsel Services) who have represented David Nagel over the years: Benjamin Keehn (Ex. 163), Diane Juliar (Ex. 114 - 119), Martin Rosenthal (Ex. 120 - 128), Andrew Silverman (Ex. 129 - 130). As further detailed below these materials, which are laden with attorney-client statements and other confidential material, were released pursuant to an agreement between Nagle and Rodwell's

current counsel that they be released on Nagle's death, which occurred on December 18, 2012.

2. A recorded interview of David Nagle on May 25, 2012, not quite seven months before Nagle's death. (Ex. 98 and 98A) This was secured with the agreement that the recording or any transcript would not be released before Nagle's death.

3. A redacted copy of the Drug Enforcement Agency "Confidential Source" file on David Nagle, produced in early 2014 at the request of the Commonwealth, with an additional production on June 19, 2015. (Ex. 162A and 162B)

4. The transcript of Nagle's testimony in United States v. Mourad (1983) (Ex. 97) concerning his history as an informant in various matters, including the Rodwell trial.

The motion was also supported with affidavits of numerous witnesses who would later testify in evidentiary hearings.

The newness criterion is therefore met, particularly as to Nagle's recorded statement, the testimony and contemporaneous notes of his attorneys, the DEA file, and the testimony of many (not all) of the witnesses who testified at the hearings. I have relied on these, and also some of the materials accompanying earlier motions whose potential significance is apparent in the context of the newer materials. In short: the issues of whether David Nagle was acting as a government informant when he and Rodwell were in Billerica together, and whether the Commonwealth adequately disclosed the promises, rewards and inducements extended to him, were each litigated previously, but without the benefit of the evidence presented this time around, and so I have considered these issues *de novo*.

B. **Burden of Proof.**

Generally speaking,

> the defendant "bears the burden of proof on a motion for a new trial," Commonwealth v. Marinho, 464 Mass. 115, 123 (2013), and it is the defendant's burden to prove facts that are "neither agreed upon nor apparent on the face of the record." Commonwealth v. Comita, 441 Mass. 86, 93 (2004), quoting from Commonwealth v. Bernier, 359 Mass. 13, 15 (1971). See Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 637 (2001) ("The defendant has the burden of producing a credible reason to reverse the final decision, arrived at after trial or plea, that outweighs the risk of prejudice to the Commonwealth").

Commonwealth v. Ubra-Gonzalez, 87 Mass. App. Ct. 37, 41 (2015).

As noted above, the issues raised by the Seventh Motion for New Trial pertain to Nagle's status as a government agent, and the Commonwealth's compliance with its Brady disclosure obligation *vis á vis* the promises, rewards and inducements sent his way.

1. **Government Agency.**

Had he been granted a pretrial evidentiary hearing on his November 13, 1981 motion to suppress Nagle's testimony, it would have been Rodwell's burden to prove that Nagle was acting as a government agent. United States v. Li, 55 F.3d 325, 328 (7th Cir. 1995); Wallace v. Price, 265 F. Supp. 2d 545, 566 (W.D. Pa. 2003) and cases cited in each. The quantum of proof required would have been a preponderance of the evidence. Nix v. Williams, 467 U.S. 431, 444 n.5 (1984); Care and Protection of Laura, 414 Mass. 788, 791-92 (1993). This being the case, "at the hearing on his motion for a new trial [Rodwell] must establish by a preponderance of the evidence that he would have prevailed on the issue" if he'd had access to the previously unavailable evidence.

Commonwealth v. Chatman, 466 Mass. 327, 335-36 (2013) (assigning the burden in case in which counsel is alleged to have been ineffective for not filing motion to suppress).

Had he succeeded in this, the Commonwealth would have had an "extremely heavy burden" to prove that Rodwell's statements to Nagle were voluntary. Snead v. Stringer, 454 U.S. 988, 989-90 (1981), citing Massiah and Brewer v. Williams, 430 U.S. 387 (1977). It is my job, therefore, to determine whether Rodwell has proved, by a preponderance of the evidence, that David Nagle was acting as a government agent at the time he and Rodwell were acquainted in the Billerica jail, and if so, whether there is a substantial risk that Nagle's testimony made the difference between a conviction and an acquittal.

2. Brady Issue.

On his Brady claim, Rodwell "is required to make at least a threshold showing that exculpatory evidence was withheld." Commonwealth v. Figueroa, 74 Mass. App. Ct. 784, 789-90 (2009), citing United States v. Navarro, 737 F.2d 625, 631-632 (7th Cir.), *cert. denied*, 469 U.S. 1020 (1984). Having done that, he

> must establish, at a minimum, that the information sought "is relevant and helpful ... or ... essential to a fair determination of a cause." In determining whether disclosure is required in any particular case, a court must "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense."

Figueroa, 74 Mass. App. Ct. at 790-91 (citations omitted).

C. Rules of Evidence.

"The defendant 'also bears the burden of demonstrating that any newly discovered evidence is admissible.'" Commonwealth v. Drayton, 473 Mass. 23, 31 (2015), quoting Commonwealth v.

Weichell, 446 Mass. 785, 799 (2006). The evidence proffered by Rodwell presents significant challenges in this regard, chiefly under the rule against hearsay. In many instances this is because, as noted above, the witnesses most central to the issue of government agency – David Nagle and Thomas Spartichino and, to a lesser degree, Detective Philip Oteri of the Somerville Police – were alive at the time of trial and a good while thereafter, but are now deceased.[22] For example:

- Although Spartichino and (especially) Nagle have left written or recorded statements behind, the hearsay exception for declarations of a deceased person (G.L. c. 233, §65) applies only to civil cases.
- To qualify under the exception for dying declarations, the statement must have been made under the belief of imminent death and shortly before it, and must "concern the cause or circumstances of what the declarant believed to be [his] own impending death," Commonwealth v. Nesbitt, 452 Mass. 236, 251-252 (2008), requirements that even Nagle's deathbed recorded statement does not meet.
- Prior recorded testimony is admissible only if the witness is available for cross examination, Commonwealth v. Daye, 393 Mass. 55, 73-75 (1984), or if the presently opposing party was able and motivated to cross examine at the time of the earlier testimony. Commonwealth v. Fisher, 433 Mass. 340, 355 (2001). In this case, therefore, I have considered Nagle's testimony in the Rodwell trial as evidence, and have considered his later statements, not for their truth, but for impeachment purposes only.

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[22]Nagle died on December 18, 2012. I take judicial notice of the facts that Spartichino died on January 10, 2001, and Oteri, on November 15, 2011.

> And while I have ruled that the Mass. Defenders "running sheets" – detailed, typed, and contemporaneous notes made by the Mass. Defenders and CPCS attorneys who represented Nagle over the years – qualify as business records under G.L. c. 233, §78, a good deal of what is recorded there is in the form of statements by other persons (including Nagle). Sometimes, the fact that a statement was made has independent significance, but they require a hearsay exception of their own to be admissible for their truth. Kelly v. O'Neil, 1 Mass. App. Ct. 313, 316 (1973). (The same goes for police reports, which were the subject of the Kelly ruling.)

There are at least two decisions from last year that provide a measure of relief. One is Commonwealth v. Cowels, 470 Mass. 607 (2015). There, the SJC noted that although "'evidence of a type merely tending to impeach or to corroborate credibility of a witness ordinarily will not be the basis for ordering a new trial,' ... in rare cases, a new trial may be warranted "[w]here the Commonwealth's case depends so heavily on the testimony of a witness' and where the newly discovered evidence 'seriously undermines the credibility of that witness.'" Id. at 621 (citations omitted).

There is also Commonwealth v. Drayton, *supra*, a murder case in which the court considered an affidavit given by a woman, then terminally ill with a metastatic cancer, in which she averred that the alleged eyewitness on whose testimony the defendant's conviction largely hinged had been with her (the affiant) at the time of the shooting, in a location from which he could not have seen it.

The trial judge declined to hold an evidentiary hearing, ruling that the affidavit did not qualify as a dying declaration. The SJC agreed on this point, but nonetheless reversed. While

reaffirming its disinclination to adopt a "residual" or "innominate" exception to the hearsay rule along the lines of section 407 of the Federal Rules of Evidence, the court embraced "a constitutionally based hearsay exception," reasoning that "'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" 473 Mass. at 35, 36, quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Under the Chambers / Drayton exception, evidence is admissible "despite its failure to fall into any of our traditional hearsay exceptions, provided that the defendant establishes both that it '[i]s critical to [the defendant's] defense' and that it bears 'persuasive assurances of trustworthiness.'"[23] 473 Mass. at 36, quoting Chambers, 410 U.S. at 302.

The Drayton decision repeatedly characterizes its "constitutionally based hearsay exception" as "narrow."[24] As discussed below, some of the evidence received in the hearings in this case qualifies for admission, while some does not. Also, the evidence is replete with out-of-court statements which, although not admissible for their truth, may be considered for non-hearsay purposes. Examples would be statements by Nagle that would tend to impeach his trial testimony (admissible under Cowels), and promises made by representatives of the Middlesex DA's office to Nagle's Suffolk County attorney in 1981-82 (Martin Rosenthal), after the Rodwell trial, to see that he received a light sentence in his Suffolk cases (admissible under the business records

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[23]The indicia of trustworthiness in Drayton included the facts that the hearsay statement "'was corroborated by some other evidence in the case'" and that the affiant had, between the shooting and her death, repeated her account "on multiple occasions." The court also noted the respect generally accorded to statements by a declarant who, although not yet breathing his last, "knew that he was in real danger of imminent death – traditional indicium of reliability.'" 473 Mass. at 37, 38 (citations omitted).

[24]It bears noting that the Chambers / Drayton exception bears a reasonably close resemblance to the "residual exception" of Fed. R. Ex. 807, but that the SJC has not approved this particular federal rule for general application in Massachusetts cases.

exception). (I have also, in this narrative, taken occasional liberties where a hearsay source fills in a non-outcome-determinative detail that fits with the admissible evidence.)

III. FINDINGS OF FACT

Based on the credible and admissible evidence and reasonable inferences drawn therefrom, I find the following facts.

A. David Nagle.

1. Early Life; In and Out of the Marines.

1. David Nagle was born on July 22, 1949. He died on December 18, 2012 of end stage liver disease caused by a Hepatitis C infection. (Ex. 113)

2. Nagle grew up in Watertown, Massachusetts. He had two siblings and, after his mother divorced and remarried, three half-siblings. He was highly intelligent, outgoing, and made friends easily. (Chase pp. 46-47)

3. He was also dishonest and unreliable. William Chase, Nagle's half-brother who has retired from a distinguished career as an officer and later Chief in a half-dozen Massachusetts municipal police departments, testified that "[y]ou couldn't believe anything that he told you, that was my opinion. There were numerous, countless occasions where he was untruthful," although he no longer recalled specific instances. (Chase, pp. 82-84) Brookline Detective William McDermott would use Nagle as an informant when he was "straight and sober," but not when he was under the influence; he, too, felt he had received false information from Nagle but could not recall the specifics. (McDermott, pp. 8-10) Donald Cuccinelli, a retired narcotics detective for the State Police, was introduced to Nagle by his

DEA handler and used him once to get an introduction to a drug dealer, but he didn't trust Nagle, didn't like him, and didn't recommend him to others. (Cuccinelli, p. 27-30, 67-68)

4. On March 13, 1968 Nagle entered the U.S. Marine Corps. He never saw combat, or Vietnam. Fifteen months after he enlisted (June 8, 1969), he disappeared in the first of three recorded "AWOL" episodes. After the third elopement, he was given "Declared Deserter" status on August 26, 1969. FBI agents appeared at the Watertown house looking for him on September 17, 1969, and were referred to Nagle's girlfriend's house in Charlestown.

5. There, Nagle was found and apprehended as he tried to escape through an upstairs window. He was confined for the next five months and given an undesirable discharge on February 20, 1970. (Ex. 74; Chase 52-57) At their first meeting in the 1981 Suffolk robbery cases that play a central role in this Motion, Nagle told his new attorney that he had served in Vietnam and had been rewarded with "medals and [an] honorable discharge," none of which was true. (Ex. 121, p. 2556) There is no evidence that the Commonwealth, at the time of the Rodwell trial, knew the nature of Nagle's discharge, or the reason for it.

6. In the course of his elopements from the Marines, Nagle acquired a serious intravenous heroin addiction that would become a defining feature of his life, at least when he was not incarcerated.

2. Life of Crime, 1972-79.

7. Discharged from the Marines, Nagle began a civilian life of substance abuse, occasional work, crime, and increasingly regular incarceration. A June, 1971 case resulted in "Guilty filed" dispositions on charges of possession of Class A and Class D substances and a

hypodermic needle. On July 1, 1972 Nagle was arraigned on an armed robbery charge in the Boston Municipal Court, which was later dismissed after a probable cause hearing.

8. Nagle was a member of Local 88 of the tunnel workers' union. For much of the ensuing decade, however, he engaged in robberies, thefts, and check fraud. He amassed an impressive 35 convictions in ten years, almost always the result of guilty pleas, up to and including including the six armed robberies that were pending at the time of his service in the Rodwell case. By 1999, his Board of Probation report (Ex. 133) ran to nine pages, with robberies, larcenies, and assaults by means of a dangerous weapon taking up most of the space. It remained so to his death in 2012, because he was incarcerated for the last thirteen years of his life. Eighteen of his convictions were for armed robberies on which he served state prison sentences (usually concurrently), with a number of other such charges either nol prossed or filed.

9. Throughout the 1970s and well into the 1980s, Nagle was also a regular and prolific police informant. He met frequently with narcotics detectives from local police departments, providing them with information. Some of this information he acquired from contacts he made in the narcotics trade. He also was willing to give up his friends, accomplices, at least one relative, and others who had told him of their own or others' criminal activities. He was not above getting his information from newspapers and dressing it up for presentation to the police. (Chase 69; see Ex. 140)

10. The hearing record does not establish whether Nagle was ever paid in cash by the municipal police officers to whom he gave information. Without a doubt, however, he traded his

information for favorable treatment, both from the police and on their recommendation, in his many encounters with the criminal justice system.

11. Two entries from the summer of 1972, one from the Boston Municipal Court and the other from the Waltham District Court, each show guilty findings on charges of larceny from a person and assault with a dangerous weapon, on which Nagle received a suspended sentence fin the BMC and a committed sentence (not further described) in Waltham. From this combination of charges it is a very reasonable inference, which I draw, that Nagle made a deal by which two armed robberies were broken down and stayed in district court, with little or no time in the House of Correction. There is, of course, no direct evidence that such charge reductions were in exchange for information, but this inference, too, is almost inescapable, and I draw it.

12. The following year, Nagle received a six year state prison sentence in the Middlesex Superior Court for armed robbery, larceny over, and uttering (arraignment date: 3/28/73). He was back on the street sometime before January 20, 1975, when he was arraigned in Suffolk Superior Court on indictments for use without authority, receiving stolen goods (x4), and larceny from a person (x3), for which he received two-year concurrent sentences.

13. Additional charges in Norfolk Superior (larceny from a person x5, arraigned 1/27/75) and Brighton District (armed robbery, arraigned 11/24//75 and resolved in the district court on 2/3/76) resulted in sentences of two years each. The former was presumably to run concurrent with the Middlesex cases. The latter was later revised and revoked to 13 months, presumably to the same end.

14. Subsequent charges in 1976 received similar treatment, all with the apparent intent of putting Nagle back on the street as soon as he wrapped his two-year Suffolk sentences. These were:

    a. Larceny of a motor vehicle (Brighton District, arraigned 6/2/76, sentenced 8/16/76 to 2 years, revised and revoked to 13 months);

    b. Larceny (Brookline District, arraigned 7/2/76, sentenced 7/9/76 to 18 months);

    c. Larceny and larceny from a person (Brighton District, arraigned 7/13/76, sentenced 8/16/76 to 2 years, R&R 9/14/76 to 13 months);

    d. Larceny from a person (Brighton District, arraigned 7/26/76, sentenced 8/16/76 to 2 years, R&R 9/14/76 to 13 months); and

    e. Larceny from a person and assault dangerous weapon (BMC, arraigned 10/28/16, suspended sentence imposed 10/25/78).

15. The conclusion is compelling, and I draw it, that Nagle, although working periodically as a union construction worker, was supplementing his legitimate income from time to time with thefts and robberies; that he received, over and over again, extraordinarily light sentences on the crimes for which he was apprehended and to which he pleaded guilty; and that this was because he was generously supplying information to law enforcement authorities, who reciprocated with lenient sentencing recommendations which judges were willing to follow.

16. On January 7, 1979 Nagle was arraigned in the Brighton district court on a charge of armed robbery. The charge was dismissed following a probable cause hearing on April 30, 1979. (Ex. 133)

3. DEA Informant, 1979-81.

17. Nagle had a part-business, part-quasi-social relationship with William McDermott, a Brookline narcotics detective who had arrested Nagle several times in the 1970s. Nagle trusted McDermott; provided him with information and/or asked whom he should contact if the subject of the information was outside McDermott's jurisdiction; and sought his advice from time to time.

18. In 1979, McDermott introduced Nagle to a DEA agent with whom he had worked, and Nagle thereafter became a DEA informant. **[REDACTED]** (McDermott, p. 10; Ex. 162A & 162B)

19. Sometimes, DEA agents would come to the house, usually in pairs, and would take Nagle for a ride, perhaps for a controlled buy (though the DEA reports have little to say about investigative technique). Other times his younger (by seven years) half-brother, William Chase, would drive him to the appointments. (Chase, pp. 59-64, 68-71)

20. **[REDACTED]** (Ex. 162A & B)

21. **[[REDACTED]** (Ex. 162A)

22. On or about May 9, 1980 Nagle was arrested by the Somerville police on charges of armed robbery and kidnapping. (Ex. 133) The complaining witness was a cab driver named Wilcox. Nagle was released on his own recognizance by a bail commissioner. He was arraigned in the Somerville district court, where bail was set at $50,000 with surety or $500 case. Mass. Defenders was appointed to represent Nagle in the case, which was assigned to Atty. Diane Juliar and indicted in October. In the meantime and with help from his

mother, Nagle was able to make the $500 cash bail, and was back on the street. (Ex. 115, 119).

23. Wilcox told the police that he and Nagle had known one another for about a year; that on May 7 Nagle, who knew Wilcox had $200 in his pocket to purchase a car, asked him for a ride to Lechmere Sales in Cambridge to pick up a television; and that on the way, Nagle held a knife to his throat and relieved him of the $200. He gave a more detailed, but consistent, account at the probable cause hearing. (Ex. 115, pp. 2524, 2527)

24. Juliar's first detailed interview of her client was on November 26, 1980. Nagle denied that there had been a robbery or a kidnapping, and told Juliar the following: Nagle, working as a confidential informant for the DEA (more on this below), had been in contact with a "dust dealer" named Dacey. As Juliar recorded what Nagle told her,

> The night of the incident, D [Nagle] met victim (cab driver for green cab) on Winter Hill. Victim got money from Dacey, followed to Lechmere. Victim went into D's car. D left him in Brighton (went there to buy hot stereo). Told Jones [a Somerville police officer] victim got in D's car at Lechmere. D offered to take lie detector. Released on personal recognizance at the station. To District Court for arraignment. (Ex. 115, p. 2525)

25. The Wilcox case would remain pending until, on February 26, 1982, Nagle agreed to a perfunctory jury-waived trial (in which he was convicted), as part of a global resolution of this and five more robbery cases he had picked up in the meantime (see *infra*).

26. **[REDACTED]** (Ex. 133, 162A, 162B)

27. **[REDACTED]** (Ex. 162A)

28. The June 17 report gave no further details concerning the arrest. Later, Nagle would tell the Mourad jury that he had gone to the DEA office in Boston to get paid, but was arrested there

instead. He was released the next day and went back to get his money.[25]] (Ex. 97, pp. 2243-45)

29. At his first meeting with Juliar on November 26, 1980, Nagle had recounted something similar, but in a quite different context. Her running sheet for that date relates the following:

> D'S STORY: On 4/79, arrested for Brighton Bank Robbery, no probable cause.[26] Two days later Bill McDermott, Brookline Police Department with federal Agent, tells D problem with feds. D worked for DEA one year. Wanted dust dealers in Somerville. D went to see him. D gave him 50 hits of speed for $150. D left. *Two days later D at DEA Office, arrested for these* ... Three Somerville Police Officers Jones, Oteri, Reardon (last two drug cops).[27] D denied. They said they knew the guy was a dust dealer. Said they would drop it if he got Dacey (dealer). (Ex. 115, p. 2525; emphasis supplied)

30. Perhaps this was true. The DEA records say nothing about an arrest at the Boston office, but this might be out of reluctance to draw undue attention to an agent's betrayal of an informant to the local constabulary. I am unable to say whether Nagle was arrested at the DEA office or somewhere else (nor does it much matter).

31. What *is* reasonably certain is that at least six months (and possibly a year) before he met Rodwell, Nagle had met Detective Oteri of the Somerville narcotics squad, and that Oteri made him an unusual proposition. Sometime in the summer or early fall of 1980, Nagle was

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[25]**[[REDACTED]** (Ex. 162A)

[26]This much is confirmed in Nagle's criminal record. (Ex. 133)

[27]Oteri and Reardon were partners. "[W]henever you saw one of them, you saw the other one. They were like Batman and Robin." (Whitehead, p. 86)

arrested in Pembroke, Plymouth County, on a charge of theft of a firearm. He was not arraigned until October 30 (Ex. 133) [REDACTED] .

32. [REDACTED] (Ex. 162A, 162B)

33. [REDACTED] (Ex. 162A)

34. [REDACTED]]

35. [REDACTED] (Ex. 162A, 162B)

36. There is no evidence that Nagle actually provided any assistance to the Somerville narcotics squad, or that Oteri *et al.* assisted him with the Wilcox case or anything else. The Wilcox case was indicted on November 13, 1980, although Nagle would not be arraigned for another year and a half (see *infra*). (Ex. 119) The Pembroke case was indicted as well, and Nagle was arraigned in the Plymouth Superior Court on December 16, 1980. Both cases remained pending until they were resolved with convictions on March 18 (Plymouth) and March 30 (Middlesex), 1982 (see *infra*).

37. On January 21, 1981 Nagle told Atty. Juliar that before she was appointed to represent him, he had lost his job and was arrested the same day, and had told the judge that he had defaulted out of fear for his safety due to his DEA involvement. (Ex. 115, p. 2528)

38. [REDACTED] In March-April, 1981 he reverted to his old ways, with a vengeance, committing or participating in at least five armed robberies in less than a month. He was arrested and held on April 22, 1981, [REDACTED].]

39. [REDACTED] (Ex. 162A)

40. [REDACTED] (Ex. 162A)

41. Nor is there evidence supporting Rodwell's suggestion that Nagle's May 18, 1981 deactivation was a ploy to enable state authorities to recruit Nagle to get a jailhouse confession from Rodwell – who would not even be arrested until four days later (see below) – and I find that it was not. [REDACTED]

42. Nagle did not mention in his Rodwell testimony that he had been a DEA informant.[28] This fact also did not appear in the Commonwealth's pretrial discovery (Ex. 96)[29]; nor is there evidence that the DA's office or the CPAC investigators knew of Nagle's past DEA affiliation.[30] As noted above, the issue was raised and rejected in the Second Motion for New Trial.

43. After the Rodwell trial was over, Nagle would have two more brief, in-and-out stints assisting the DEA in a the Mourad trial in Manhattan, and an investigation in western Massachusetts, before being banished for good (see below).

5. Crime Spree, Spring 1981.

44. As noted above, in the early spring of 1981 Nagle committed five armed robberies in less than a month, as follows:

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[28]Atty. Cintolo did try, on cross, to explore other occasions on which Nagle had supplied information to Massachusetts law enforcement officials, but was precluded from doing so by the trial judge. (TTr. v. 4 pp. 151-52) The SJC found in this no ground for reversal. Rodwell, 394 Mass. at 700. It does not appear that Nagle's DEA affiliation was known to Cintolo, Judge Dimond, or the SJC – yet.

[29]On the other hand, it would require a somewhat generous reading of Rodwell's pretrial discovery request (Ex. 1) to conclude that past engagements as an informant for a federal agency were covered.

[30]See discussion below regarding Detective Oteri's knowledge and whether it should be imputed to the Commonwealth.

a. On March 22, 1981, armed with a handgun, he robbed Belson Drug in Boston (Suffolk County) of $709, plus drugs.

b. On March 31, 1981, armed with a handgun, Nagle robbed the Fanieul Superette in Brighton (Suffolk County) of $700.

c. On April 5, 1981 Nagle, armed with a handgun, and an accomplice robbed the Palace Bar in Brighton (Suffolk County) of $4,700.

d. April 8, 1981 Nagle, armed with a handgun, robbed the same cashier at Belson Drug in Boston (Suffolk County) of drugs.

e. On April 18, 1981, armed with a gun, he robbed the Lake Street Drug Store in Newton (Middlesex County) of money and drugs.

45. Thus far, Nagle had not been apprehended for any of the 1981 robberies. After the Lake Street Drug job a warrant issued out of the Newton District Court. Nagle was located and arrested in Waltham at the home of an accomplice (Steven Harr, an accomplice in several of the Suffolk robberies) on or before April 22, 1981. (Ex. 25, 36, 49, 86, 115, 121 p. 2556, 140 p. 2695, 146)

46. Nagle was arraigned on three of the Suffolk robberies in the Brighton District Court on April 22, 1981. Bail was set at $50,000, and he was ordered held at the Billerica jail.[31] Mass. Defenders was appointed, and Atty. Martin Rosenthal was assigned to the case. Nagle called Atty. Juliar the next day to alert her of these recent developments. Apparently,

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[31]There is no transcript of the arraignment, so it is unclear whether Nagle was sent to Billerica due to overcrowding, for safety reasons, or for some other reason. Since Frankie Holmes would not come forward for another week and a half (see below), it clearly was not to entrap James Rodwell.

given the high bail in Suffolk, the Middlesex DA was in no rush to arraign Nagle on the the Lake Street Drug job, and it would be a year before he was indicted for it (see *infra*). (TTr. v. 4, p. 114; Ex. 108; Ex. 115, p. 2530; Ex. 121 p. 2556; Ex. 123, p. 2582; Ex. 133)

B. The Rose Murder Investigation, Holmes's Statement, and Rodwell's Arrest (1978-81).

47. In the meantime, the murder of Louis Rose in Somerville on December 3-4, 1978 remained unsolved, without so much as a suspect.

48. The investigation was led by Detective Lieutenant Spartichino, a member of the State Police CPAC unit assigned to the Middlesex District Attorney. Spartichino had begun his law enforcement career as a police officer with the Metropolitan District Commission, but later transferred, evidently on his own merits,[32] to the State Police. By the time of the Rose murder investigation, he had achieved the rank of Detective Lieutenant in the State Police Bureau of Investigative Services. He was assigned to the Middlesex CPAC unit, the DA's investigative arm reserved for homicides and other major crimes.

49. Such exhibits as are in the record and have preserved Spartichino's written and oral communications depict an intelligent, articulate, careful and detail-oriented man with experience and understanding of how a homicide case is put together. See Trial Transcript Day 4 pp. 53-107, and Ex. 5, 39, 61, 66, 117, 179, and 180.

50. Spartichino was known, within the DA's office, as a capable investigator, and well-connected within the greater law enforcement community and the criminal community as

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[32]The consolidation of the MDC Police, the Registry of Motor Vehicle Police and the Capitol Police did not take place until July 1, 1992. Acts and Resolves of 1991, Chapter 412, Section 1.

well. Often, CPAC investigators were paired, junior with senior; Spartichino, however, tended to work alone. He was an independent personality who did not hesitate to utilize specialists from the State Police when needed, but preferred handling witness interviews and other non-specialized investigative tasks himself, rather than delegating it to others. He was evidently the sole CPAC investigator assigned to the Rose murder investigation, and his reports in the Rose murder case clearly evidence his hands-on approach. (Whitehead; Powers; see Ex. 39, 179)

51. Perhaps for this reason, or perhaps due to the sort of interdepartmental rivalries and jealousies that are common in law enforcement, Spartichino was resented by at least some members of the municipal police forces with which he worked from time to time, and perhaps within the State Police. (Macone, Powers)

52. Although they worked different sorts of cases, there is no doubt that Spartichino and Detective Oteri, who was a frequent presence in the DA's office, in 40 Thorndike Street adjacent to the CPAC office, knew one another. (Whitehead, pp. 48, 60)

53. Spartichino was at the scene of the Rose murder less than an hour after the Somerville Police responded to a call concerning a body in an automobile on Garfield Street. Other State Police personnel followed in short order, processing the crime scene and beginning the investigation, which Spartichino would lead. The body was identified as Louis Rose, whom one of the Somerville officers on the scene knew to be the son of a Captain on the Burlington Police. At 3:00 a.m., Spartichino called Captain Rose to tell him of the death of his son, and that it was an apparent homicide. (Ex. 39)

54. In the very early days of the investigation, Somerville Police officers and detectives participated in the investigation, assisting the State Police principally on matters requiring "local knowledge."

55. The one investigatory task that the evidence links to Oteri was to obtain contact information for one Anthony Erich, whose car had been seen in the area. Evidently, Erich was affiliated with Merchants Metal, a business at 100 Garfield Avenue, Somerville that the police suspected of fencing stolen jewelry and melting it down into saleable precious metals. According to a later report by Lt. Spartichino, "there ha[d] been reports of known criminals frequenting the area," which would warrant a second look in any homicide investigation. Like the other leads pursued at the time, however, this one went nowhere. (McCann; Trant, pp. 55-60; Ex. 39, 59, 142, 178)

56. The Burlington police, for obvious reasons, took an interest in the case. A Burlington detective located two witnesses with information. Only one – Kevin Farrell – was willing to give a statement. He told Spartichino that on the evening of December 3, 1978 the two had seen Rose (whom they knew to be a drug dealer[33]) rendezvous outside his Woburn apartment with three males in "a blue Torino (Olds)" *[sic]*,[34] one of whom went with Rose (who was carrying a rifle) into the apartment. The two emerged five minutes later, Rose carrying the rifle, which he placed in the trunk of his car (a light-colored Buick or Oldsmobile), the other carrying an object that rattled and might have been a jar or bottle of

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[33]Farrell did not know Rose but the other, unwilling witness did, and pointed him out to Farrell.

[34]I take judicial notice of the fact that the Torino was a Ford model, not an Oldsmobile.

pills. Rose and the jar-carrier got into the back seat of the Torino, which then drove away. The two witnesses then left the area. Farrell was able to give descriptions of the two visitors whom he had seen get out of the Torino, but did not know them.[35] (Ex. 39)

57. Spartichno summarized the investigation to date in a report dated March 25, 1979, which closed, "Investigation to continue." (Ex. 39)

58. So far as appears, however, the investigation would remain dormant for the next two years, with no plausible suspect. On Sunday, May 3,1981, however, Francis Holmes, convicted of armed robbery and now held in Billerica on a parole violation triggered by a federal arrest for interstate transportation of stolen goods, asked his cellmate, Robert Trenholm, for the name of a policeman he could trust with some information he had. Trenholm mentioned Bill Powers, a State trooper whom Trenholm remembered as having treated him fairly in the arrest and prosecution of a fraud case. (Powers, pp. 94-95)

59. Powers had been with the State Police for seven years, and was currently serving in the Major Crime Unit's newly created Auto Theft division. Trenholm called Powers and told him that his cellmate had some information for him, but without giving details.

60. Powers went that evening to Billerica, and met with Trenholm, then with Holmes in the same visit. He took an unrecorded statement from Holmes concerning the Rose murder, in which Holmes identified Rodwell as the shooter. Holmes was eager for consideration in

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[35]The other, unwilling witness knew Rose, and pointed him out to Farrell. With Rose were a white male, neatly trimmed mustache and beard and full head of wiry dark hair over the ears, about 5'8", 180-200 pounds, wearing blue jeans and dark leather coat or jacket, age about 25; and a husky, clean shaven white male about 6 feet. The Torino had a green and white plate beginning with "3." At the Rodwell trial Farrell referred to Rose and the others by description, not by name.

return, telling Powers he and his girlfriend were expecting a second child and that he could not afford a lengthy prison sentence. Powers said he would make his assistance known to law enforcement – he recalled the Middlesex DA and the federal authorities, while Holmes testified at the Rodwell trial that his concern was getting help with his parole revocation hearing – but made no other promises. (Powers, pp. 95-100; TTr. v. 3 pp. 15-16)

61. The next day (Monday, May 4), Powers reported to Lt. Col. O'Donovan, the second in command in the State Police and head of its Bureau of Investigative Services, on what he had been told, and was directed to contact Lt. Spartichino of the Middlesex CPAC unit, whose investigation it was. He did so, met with Spartichino, and summarized what Holmes had told him the night before. Spartichino said he'd like to meet with Holmes himself for a stenographically recorded statement, and invited Powers to come along.

62. The two went to Billerica with a stenographer at 8:00 p.m. on May 4, 1981, where they spent a little less than an hour with Holmes. It must have been a gratifying hour, for in it Holmes gave a statement that identified Rodwell as the shooter and included some details that generally corroborated Kevin Farrell's statement of two years before. These included the facts that Holmes, Rodwell and his friend Dapper had arrived at Rose's apartment in a rented, old-model blue Ford Torino; that Dapper was about 5'8" with black hair and wearing dungarees and a leather jacket (Holmes was not asked for a description of Rodwell); and that Rose had emerged from his apartment building carrying a rifle and "a jar of percodan."[36] (Ex. 61)

[36]There were discrepancies as well: Rose, not his companion, was carrying the jar, and both cars – not just the Torino – drove away.

63. Holmes then proceeded with a narrative of the car ride to Somerville, the shooting on a dark street ("he shot Louie seven times in the head ... I counted the shots"), throwing the guns off a bridge, the drive into the North End and stop at a bar, a stop at Rodwell's lawyer's residence, and the drive back to Burlington, much as he would relate in his trial testimony a little more than six months later. (Ex. 61)

64. Between 9:00 and 10:00 p.m. on May 22, 1981 Spartichino and three others from the State Police, Detective Oteri and two other Somerville detectives, and a detective from Woburn converged on the Harbour House Motel and Lounge in Lynn. They located Rodwell in the lobby and placed him under arrest for the Rose murder, armed robbery, and carrying a firearm without a license. He was transported to the Somerville police station, where he was booked. The search at booking was conducted by Oteri. Rodwell was given a Miranda warning and declined to make a statement. (Ex. 179)

65. So far as the evidence reveals,[37] Oteri's participation in the Rose murder investigation was limited to the inquiry in or about December 1978 concerning Merchants Metal, the arrest on May 22, 1981, and the search at booking. There is no evidence that he reported to the Middlesex DA's office or its CPAC unit, or that he was subject to their control, or that he participated in the investigation and evaluation of the case beyond these strictly ministerial tasks. (Ex. 73, 179)

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[37]It may be that if the Somerville Police Department's file had been better cared for, Oteri could have been shown to have had a more active role in the investigation. The Somerville police station is prone to periodic flooding that has damaged or destroyed some of the closed files stored there. Also, it appears that many original documents, apparently from the Rose murder file, somehow left the station and found their way into the hands of one of the attorneys who preceded Atty. White in handling one or more of the previous new trial motions. Some of these were accounted for in the 2/16/6 testimony of Retired Somerville Police Officer Thomas Macone, who says he was given a dozen or so writings and crime scene photos by a Detective O'Connor, who had been "told to clean out a lot of the dead files in the Bureau and, knowing that Macone knew the Rodwell family, asked if he would like to have them. Macone said yes, picked up the documents, and gave them to Rodwell's father. (Macone, 2/16/16) There were may more documents than these in the defense new-trial file, however, which have the appearance of being Somerville Police originals but whose provenance is otherwise unaccounted for. Many of these I excluded, on grounds of authenticity (but I note anyway that none bore the name Oteri).

In any event: the sum total of the documents tendered, admitted and excluded, did not depict an active role by the Somerville police in the investigation after the first few days except for the arrest and booking. The defense handwriting expert was able to tie only one of these documents, the notes pertaining to the small chore involving Merchants Metal (Ex. 173), to Detective Oteri. A second document, the envelope for the belongings taken from Rodwell at booking and bearing Oteri's name (Ex. 73), was authenticated through extraneous evidence (Ex. 179). Nothing else ties Oteri to the Rose investigation.

C. Nagle Meets Rodwell, then Spartichino (1981).

66. Rodwell was moved to the Billerica jail, probably on May 22 (the date of his arrest) but perhaps on May 26 (his recollection at trial). As noted above, David Nagle had been there since April 22.

67. According to Nagle's testimony at the Rodwell trial (plus, in brackets, Holmes's testimony, the chronology of his interactions with Rodwell was as follows:

April 22, 1981	Nagle arrives at Billerica; meets Holmes in infirmary right away but they never discuss Rose murder (TTr v. 4 pp. 115, 130-31, 146)
May 18 or 19, 1981	Nagle gives statement to Suffolk detectives,[38] and first requests transfer out of Billerica (TTr v. 4 pp. 146-47, 149, 162)
May 22-24, 1981	Nagle meets Rodwell (TTr v. 4 pp. 115, 145, 152, 158-60)
Late May / early June	Nagle's first conversation with Rodwell re Rose murder ("maybe a week, ten days after he came in"; "maybe the first week of June") (TTr v. 4 pp. 118, 131, 164)
[June 15, 1981	Francis Holmes granted immunity in grand jury (TTR v. 3p. 58)]
Soon afterward:	(Nagle is vague on the date) Rodwell, returning from probable cause hearing, solicits Nagle to testify falsely that Holmes admitted to being the shooter, and talks about having Holmes "whacked out" (TTr v. 4 pp. 132-38, 188-89)
End of June, 1981	Nagle and Rodwell locked up after fight with other inmates, pending disciplinary hearing; they have their last conversation, in which Rodwell says, "They don't know what an animal I am. I put seven in the kid's fuckin' head." (TTr v. 4 pp. 139-40, 153)
(?)	Nagle calls William McDermott, who contacts Spartichino (TTr v. 4 pp. 142)

[38]The correct date is May 1, 1981. (Ex. 140)

July 9 or 10, 1981	Nagle's first conversation with Spartichino (TTr v. 4 pp. 140-41, 153)
July 14, 1981	Nagle transported to Greenfield, arranged by Spartichino (TTr v. 4 pp. 115-16, 163-64)
August 6, 1981	Nagle makes stenographically recorded statement to Spartichino in Greenfield HOC chapel (TTr v. 4 pp. 154-56

68. For reasons detailed below (subpart "H"), I find that Nagle did, in fact, connect with Spartichino through William McDermott. Although neither trial attorney asked Nagle, and did not specify,[39] the date that he made his call to McDermott, it is a reasonable inference – assuming Nagle *did* call McDermott; see below – that it was in July, and likely not more than two or three days before Spartichino's visit on July 9 or 10. I doubt McDermott would have waited long to learn who was handling the Rose murder and make the call, and I very much doubt that Spartichino, upon learning of a potentially corroboratory witness in a two and one-half-year-old homicide case, would have allowed the sun to set before following the lead.

69. On May 1, Nagle was arraigned in the Brighton district court on the second Belson Drug robbery.[40] (Ex. 108, 133) He spent the late morning and early afternoon of that day with three Boston detectives who had come to get a statement. For most of this session, which

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[39]Although Nagle would later reiterate, over and over, that he had called McDermott and that McDermott had connected him to Spartichino, the date of the call never came up.

[40]This was also the date the arrest warrant was returned served. (Ex. 108, p. 2484) Nagle had been in custody since. Why three of the cases, in which two of the complaints issued on April 8th and the third on the 10th, were arraigned on April 22nd, but the fourth, whose complaint is dated April 21st, was not arraigned until May 1st, I cannot explain, particularly inasmuch as it involved a robbery of the same pharmacist at the same pharmacy as one of the earlier three. (Ex. 123)

was recorded and later transcribed, Lt. Kelly did the questioning with Dets. Larry Pacino and Matthew Caroll present. This was followed a few minutes later by additional questioning by Det. Rufo. Nagle confessed to participating in the four Suffolk robberies: Belson Drug Co. in Brighton (twice), the Palace Spa in Brighton, and the Faneuil Superette. He also confessed to the Lake Street Drug Store (which he called "College Pharmacy") in Newton. He named his accomplices, and gave information concerning robberies and other crimes, mostly in Suffolk and Middlesex Counties, that these and other acquaintances had been involved in. (Ex. 140)

70. In three-quarters of an hour and 38 pages of transcript, Nagle named those responsible for robbing nine pharmacies (one in Waltham; three of them twice), three convenience stores, a spa, a card game, and "one of those Greek social clubs" in Cambridge. He identified the people behind an unconsummated plot to blow up the personal automobile of one of the detectives present at the interview, in which Nagle -- who, being a "miner" (member of the tunnel workers' union), had access to dynamite – played along for awhile but eventually backed out ("I wasn't about to, ya know, kill a cop"). He gave up those in collateral businesses – car thieves, fences, drug dealers, gun traffickers, and the number one high-level B&E artist. There were fifteen names in all, many of them Nagle's partners in crime, and all of whom, one might assume, would be displeased with Nagle if and when they found out. (Ex. 140)

71. Later that day, Nagle told Rosenthal that he had confessed to the detectives

> in hopes of a deal such as 5-10 MCI Walpole; they were non-committal. [Nagle] asked Det. Pachino for a Concord sentence, but doesn't really expect a shot at it. Det. Rufo says no promises, but [Nagle] has a shot at 3 yrs. parole eligibility to Concord (10 & 10).

> Wants to talk to [Nagle] some more. [Nagle will talk to Rufo and Kilroe, not Pacino. Det. (Sgt.?) Simmons says that's OK; but has to include either Kilroe or Russo. (Ex. 121, p. 2558)

In other words: Nagle was being Nagle, trading maximum cooperation for minimal incarceration. The Suffolk detectives seemed very appreciative, but all parties recognized that police officers can put in a good word; prosecutors can recommend a sentence; but only judges can direct what the sentence will be. This is how it would play out in Nagle's Suffolk cases, minus the prosecutor component.

72. Soon afterward, Nagle began a campaign to get a transfer to the Franklin County jail in Greenfield, near his girlfriend / wife[41] and infant daughter, and away from Suffolk and Middlesex prisoners who might recognize him for a snitch. On May 5, Juliar received a letter from Nagle, saying the following:

> Dear Diane,
>
> I have some good news. I made a deal with Brighton a 10 year indef and they are going to go to Middlesex. I also helped Middlesex authorities. Things will work out. I have to go back to Brighton 5-18. I might go to Greenfield because I have to testify.
>
> Your best client,
>
> David

73. Rodwell points to this as evidence that Spartichino had already met Nagle, perhaps on the trip to Billerica on May 4 in which he took Holmes's statement, and arranged for him to entrap Rodwell. This is an unnecessary interpretation of the letter. Nagle had been arrested

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[41]Nagle told Rosenthal that he had been married for three years, but would tell Suffolk County detectives a week later that he lived with his girlfriend of three years. (Ex. 121, p. 2556; Ex. 140, p. 2689) Whichever she was, Nagle was clearly devoted to Missy and their daughter Courtney, and Missy seems to have been remarkably patient with him.

in Waltham, presumably by or with the assistance of the Waltham Police; he had been housed in the two weeks since in a Middlesex jail; and he *always* "helped" authorities by supplying them information when it could benefit him. Nagle being Nagle, his "help[ing] Middlesex authorities" could be a reference to the statement he had given to Detective Oteri and his partner Reardon when he was arrested in the Wilcox case (Ex. 115, p. 2528), or to whatever he told the officers who arrested him in Waltham on April 18, or to his statement on May 1 to the Suffolk detectives about crimes in both Suffolk and Middlesex Counties (Ex. 140).

74. There is also the issue of timing. There is no evidence that Nagle had ever met or heard of Rodwell, who would not be arrested until two and one-half weeks after the Holmes statement, presumably because Spartichino spent some time fact-checking the statement before committing himself to a suspect. Nor is there evidence, or any reason to believe, that Spartichino (a Middlesex homicide detective) had ever met or heard of Nagle (a predominantly Suffolk County drugstore robber).

75. Although it is chronologically and geographically possible that Spartichino met Nagle before arresting Rodwell and that he recruited Nagle to cozen an admission from Rodwell (who might or might not be assigned to Nagle's cell block), there is no direct evidence, and no reasonable inference to be drawn from the circumstantial evidence, to support such a conclusion.

76. It is also telling that Nagle began urging his lawyer, Atty. Rosenthal, to arrange a transfer to Greenfield *before* Rodwell was arrested and brought to Billerica. There was an in-court appearance on May 18 at which the Suffolk ADA on Nagle's cases (Joel Goldman)

promised "help in transfer to Franklin County Jail," and Nagle waived a probable cause hearing (which he and Rosenthal had already concluded was "beside the point"). This was, I infer, a quid pro quo. The district court judge ordered that the mittimus specify that Nagle be housed in Greenfield, but the change was not made and he was sent back to Billerica instead. (Ex. 115, p. 2531; Ex. 121, pp. 2558-59)

77. On May 21 – the day before Rodwell's arrest – Rosenthal heard from Juliar that Nagle was "still in Billerica." He called the clerk, and was told that the "mittimus should have been to Franklin; he thinks court officers reluctant to take [Nagle]."

78. The same day, Rosenthal got a call from Robert Nelson, informing him that he (Nelson) had taken over Nagle's Suffolk cases. Nelson was a capable and ambitious second-year prosecutor in the drug unit who was itching for a transfer to a general felony team in which he might make his mark, and viewed his assignment the Nagle case as an important step in the right direction. Rosenthal raised the transfer issue with him, and Nelson he would look into it. He evidently did, and reported later the same day that "Sgt. Hudson's office will get new mittimus and transport [Nagle]."

79. Nagle, more than most, would have understood that a confession from the suspect in a long-unsolved murder case was the score of a lifetime for a seasoned snitch. His efforts to get out of Billerica as soon as possible are fundamentally incompatible with the theory that there was already a plan in place to elicit a confession from Rodwell, who was just then enjoying his last day of freedom. (Nelson, pp. 20-23, 27-28, 44-46; Ex. 121, p. 2559)

80. The actual move to Greenfield, however, was a long time materializing due to logistical issues. "Transfer" to a different institution, a judicial function, requires only a notation on

the mittimus. "Transport," the Sheriff's responsibility, can be resource-intensive, especially when the receiving institution is 100 road miles away, as Greenfield is from Boston. I take judicial notice of the fact that sheriffs still, decades later, have a difficult enough time getting detainees back and forth between courthouses and institutions in the same or a neighboring county, and it seems a reasonable inference that the Sheriff of Suffolk County bristled at this assignment. For whatever reason – and this one seems sufficient – it would take nearly two months to move Nagle from Billerica to Greenfield. In the meantime, Rosenthal revisited the issue with Nelson on May 22, and with Nelson and First Assistant Paul Buckley on May 26, to no avail. (Ex. 121, p. 2559)

81. On June 18 and 19, however, Nagle – still in Billerica – told his Suffolk attorneys (Rosenthal and David Skeels, a CPCS lawyer assigned to the First Session who covered Nagle's arraignment on the fourth Suffolk robberies) that he wanted to delay his move to Greenfield so that he could talk to Lt. Masuret, a State Police detective assigned to Plymouth County.[42] It is a reasonable inference, which I draw, that Nagle was attempting to put a deal together in his Plymouth case, just as he would eventually do in the Suffolk and Middlesex cases, by cooperating with the investigating officers. (Ex. 121, pp. 2559-60; Ex. 125)

82. Rosenthal "advised against it" out of concern that Nagle, "a notorious dime-dropper who is once again engaging in informative conversations with Boston police," would be at risk in any Middlesex, Suffolk, or Norfolk County jail. Nonetheless, when Spartichino

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[42]See Commonwealth v. Look, 379 Mass. 893 (1980); Commonwealth v. Chase, 372 Mass. 736, 746-47 (1977); Whitehead, pp. 60, 75; obituary at http://www.legacy.com/obituaries/southofboston-ledger/obituary.aspx?pid=159529425.

interviewed Nagle on July 9 or 10, 1981 (see below), it was at Billerica, where Nagle was still residing. It was Spartichino, not the Sheriff, who arranged a ride for Nagle to Greenfield (see below). (Ex. 121, p. 2559-60; TTr. v. 4 p. 153; Ex. 121)

83. In the meantime, Nagle was indicted on all four Suffolk cases on June 8. (Ex. 123) Of the two Middlesex cases, the Somerville robbery and kidnapping (Wilcox) had been indicted on October 7, 1980, but the Newton (Lake Street Drug Store) case would not be indicted until March 11, 1982, when a global plea deal was near.[43] (Ex. 86, p. 1753-54, 1774-75)

84. The year before, when Nagle was arraigned in the Wilcox case in May 1980, Nagle's mother had posted a $500 cash bail. On June 12, 1981, Nagle appeared in the Superior Court in Cambridge with Atty. Juliar, who explained that since he was now being held in Suffolk on $50,000 cash bail, Nagle wished to surrender himself to the Middlesex court so that his family could get back the $500 posted there. The judge suggested he might set a new bail at $10,000; Juliar asked that it stay at $500; and the ADA (Jane Walsh) agreed. Juliar asked to be seen at sidebar, and told the judge:

> My client has been held in Middlesex on Suffolk bail for protection purposes in that he has given a great deal of information to the Suffolk D.A.'s office and actually to some Middlesex police as well, regarding other matters. On the Suffolk cases they intend to transfer him to the western part of the State for safety purposes. My only

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[43] I do not share Rodwell's view that the delayed indictment is evidence that Nagle was acting as a government agent; in fact, I do not understand the logic. Not all cases are indicted as promptly as Nagle's 1981 Suffolk robberies. He was being held on a $50,000 Suffolk bail he couldn't make, and there may have been a decision in Middlesex to hold off on the Newton indictment at least until after he had testified in the Rodwell trial, which then had an August 25, 1981 trial date. Concealment of the Newton case would have been impossible, and it was not the motive here: at the trial, which had been continued to November, Nagle testified accurately that he had pending charges in Suffolk ("four armed robberies") and in Middlesex ("an armed robbery and an armed robbery and kidnapping"). (TTr v. 4 pp. 114, 144-45)

> concern is whether this may hold up the transfer in any respect, or if there's any magic phrase that could be put in it. ... He will be pleading on the Suffolk cases.

The clerk advised, "That's strictly between the Sheriffs. They can do that." The court revoked the prior bail and set the new bail at $500, and the old bail was returned to the surety. (Ex. 29, pp. 766-71)

85. By this time, according to his trial testimony, Nagle was speaking with Rodwell. He would meet Spartichino, thanks to McDermott's efforts, nearly a month later, on July 9 or 10, and make an unrecorded statement concerning what Rodwell had told him.

86. On July 13, both sides appeared before Judge McGuire for a pretrial conference. The transfer issue was raised again, and the judge ordered that Nagle be remanded to Greenfield. Arrangements were made with the Sheriff's office to turn Nagle over to the State Police, who would supply the transportation. (Ex. 121, p. 2560)

87. Where the Sheriffs, the lawyers, and at least one judge had failed, Spartichino succeeded: the next day, July 14, 1981, Nagle was on his way to the Greenfield jail in a cruiser driven by William Flynn of the Middlesex CPAC unit, at the behest of Spartichino. (Spartichino was careful to elicit from Nagle in his recorded statement that he (Spartichino) had arranged the transportation, but not the transfer.) (Flynn; Ex. 66, p. 1188; see Ex. 98, p. 2399)

88. On August 6, 1981 Spartichino drove out to Greenfield with a stenographer and conducted a formal interview of Nagle. At the end, he asked Nagle if he had made his statements "of your own free will ... without any promise or favor from me ... [or] any other police agency or District Attorney's Office of Middlesex County." Nagle replied "Yes, I am" to each, and promised that he would appear as a government witness in the Rodwell case. Three days

before the interview, Nagle had told Atty. Rosenthal that Spartichino was coming out to see him, and that he was hopeful that Spartichino would help him get a sentence of three to five or, at worst, three to seven years. (Ex. 66, p. 1189; Ex. 121, p. 2561)

89. In the meantime Steven Harr, Nagle's accomplice in the Fanieul Superette robbery and one of the men Nagle had fingered in his interview with the Suffolk detectives on May 1, had been arrested and charged in the Brighton district court. Harr had a hearing (likely, on probable cause) scheduled for August 3, and a writ of habeas corpus issued for Nagle's appearance. He was not transported; Greenfield reported that the habe had been canceled; and there was some suspicion on the part of the ADA on the case that this was the work of his attorney (who denied having anything to do with it).

90. Harr's hearing was continued to September 11; Rosenthal said Nagle would be taking the Fifth; the Harr ADA said she was going to get him there anyhow; he was not transported; and Harr was dismissed without prejudice, to the annoyance of police and prosecutor. There is no direct evidence that Spartichino or any other Nagle wellwisher brought this about, and being somewhat familiar with the vagaries of transportation by sheriff departments for court appearances (albeit several decades later), I draw no inference. (Ex. 121, pp. 2561-62)

91. The Rodwell trial, originally scheduled for August 25, 1981, was continued to October 20, then to November 17, 1981. Howard Whitehead, the attorney originally assigned to it, had been appointed First Assistant the preceding December. Sometime in late August or afterward, Whitehead reassigned the case to David Siegel.

92. It took some effort on the prosecution's part, but things came together for the prosecution. Holmes had agreed to cooperate with the FBI and with the Rodwell investigation, had his

parole reinstated, was placed in the federal witness protection program, married his girlfriend, took the Fifth in the Rodwell grand jury, was immunized and testified, took the Fifth again before trial, and was re-immunized and testified against Rodwell. Nagle was transported to Cambridge when the time came, apparently again by Trooper Flynn, and testified as well. Rodwell was convicted.

D. Post-Trial: Spartichino Makes Good (1981-82).

93. After the Rodwell conviction, Lt. Spartichino kept his promise to assist David Nagle with his legal difficulties, by both writing a letter and speaking on Nagle's behalf.

1. Suffolk County.

94. In September of 1981, Suffolk ADA Robert Nelson was telling Rosenthal and Juliar that he would recommend a sentence of 15 to 20 years on a plea, and life after a trial. Nagle, who was then hoping to resolve all of his robbery cases with concurrent Walpole sentences of 4 to 8 years to be served in Northampton, told Rosenthal he would call Spartichino, and suggested that his trials be continued for a while. (Ex. 115, pp. 2532-33; Ex. 121, pp. 2562-63)

95. In October, Nelson reported to Rosenthal that he had received calls from Spartichino and from Paul Leary, a First Assistant (there were two) in Suffolk who seemed sympathetic to the value that Middlesex authorities placed on Nagle's cooperation. (Ex. 121, pp. 2563)

96. Thereafter – and especially, after the Rodwell conviction – Rosenthal's running sheets chronicle numerous promises and representations of assistance by Spartichino and others in Middlesex County, as well as some of the Suffolk detectives whom Nagle had assisted, to assist Nagle in getting a sentence he could live with. It is difficult to know how much

credence these ought to receive. Rosenthal, who testified at the motion hearing, remembers nothing of his representation of Nagle. Because most of his information came from Nagle himself who, although realistic about his chances at trial, was an inveterate optimist as to disposition, and Rosenthal appears to have accepted most of what Nagle told him at face value.

97. Although I have ruled that the Mass. Defenders running sheets are business records, their summaries of statements of fact by others (notably, Nagle) fall within no hearsay exception. These statements are, in large part (but not entirely; see below), uncorroborated. According to the running sheets:

a. Nagle reported that Spartichino wrote to Nelson and spoke with him on several occasions, on one of which (according to Nagle on 10/29/81) Nelson "softened up and said 'whatever you want.'" He was likewise "very receptive" in a later talk with Spartichino (1/5/82, again per Nagle). Having heard Nelson's recollections, decades later, of the Nagle cases, I am skeptical. In any event, this supposed good news was tempered when on January 19 and again on February 16, 1982, Nelson told Rosenthal, as before, that his recommendation was 15-20 (though Spartichino thought he'd said 10-15). (Ex. 121, pp. 2563-65)

b. Rosenthal spoke directly with Spartichino on January 19, 1982. Spartichino evidently reaffirmed his commitment to assist Nagle, reminding Rosenthal that Nagle had originally contacted him out of concern that Rodwell had recruited him to commit perjury. In Rosenthal's paraphrase: "'I owe the kid and I gotta come through. Only "deal" was to write a letter and anything else was out of goodness of

heart. How's 8-10 sound?'" Spartichino also told Nagle that he would approach Suffolk DA Newman Flanagan. (Ex. 121, pp. 2565)

c. Spartichino wasn't the only policeman who felt he owed Nagle a favor. The Boston detectives with whom Nagle had spoken on May 1, 1980, led by Detective Rufo, were also promising to advocate with ADA Philip Beauchesne (head of one of the Suffolk DA's felony trial teams) and Paul Leary (First Assistant) for a lenient sentence for Nagle. (Ex. 121, pp. 2562-65)

d. Spartichino told Rosenthal he had called Brian Gilligan, the head of the Suffolk Drug Enforcement Unit and Nelson's immediate superior (with whom Rosenthal had also spoken), and that Gilligan had promised that "he'd help the kid out."[44] Dave Rodman, who was in charge of public relations for DA Flanagan and his office, told Spartichino he would put the case to DA Flanagan himself.[45] (Ex. 121, p. 2565)

e. On February 17, 1982 – the day after Nelson had reiterated his 15-20 recommendation to Rosenthal, and the morning Nagle had learned that the Greenfield sheriff was balking at keeping Nagle for the duration of whatever sentence he might receive – Nagle reported to Rosenthal that he'd spoken to

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[44]Gilligan (now Judge Gilligan) testified at the motion hearing. He did not recall the Nagle cases or speaking with Spartichino. Rosenthal's running sheets did not refresh his recollection, but he acknowledged that he had forgotten much of the day-to-day routine from 34 years ago. (Gilligan, pp. 11-16, 18-20, 23-24)

[45]Judge Gilligan didn't recall this either, but thought it unlikely that the public relations secretary would be engaged in sentencing advocacy. (Gilligan, pp. 28-29) Nelson, who did remember the Nagle cases, was of the same view. (Nelson, pp. 74-76)

Spartichino, who "can't understand what happened," especially after he and two other "heavies" (Boston homicide detective John Ridlon and someone named Byrd) had gone "over there" (whether to Boston or Greenfield is unclear) on his behalf. (Ex. 121, pp. 2565-66)

f. If the running sheets are taken at face value, there was a campaign in late 1981 and early 1982 by Spartichino and Rufo to have Nelson replaced with someone who might recommend a sentence more palatable to Nagle than 15-20. They represented that they would approach ADA Philip Beauchesne, the head of one of the Suffolk DA's felony trial teams, to see if he might replace Nelson with someone more tractable. Beauchesne's eventual response, apparently to Rosenthal's face, was "We're not gonna touch it. Just gonna go through in [the] usual course of business."[46] (Ex. 121, pp. 2562-65)

g. On February 17, 1982 Nagle told Rosenthal that "he's inclined to take his chances with J. Linscott[47] on change of plea next week, especially since Spartichino has promised intervention with the Parole Board and likelihood of 1/3 time." (Ex. 121, pp. 2565-66)

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[46]There is no suggestion that the Middlesex DA's office proper was involved in a campaign to replace Nelson, and each witness who had been a Middlesex or Suffolk ADA at the time and was asked about this testified credibly that prosecutors didn't make such requests. As Whitehead put it, "Never. John Droney would replace me if I did that." (Whitehead, p. 117) This might account for Rosenthal's gripe to Spartichino on January 11, 1982 "that Whitehead's participation" in the lobbying process "hadn't been that great."

[47]Judge Andrew Linscott was known as "a very kind man," whose "kindness extended to an understanding of human frailty to a degree that was much appreciated by the defense bar, maybe not as much by the prosecution bar. And he was perceived as a – if you're going to plead guilty, as [a] judge before whom you would get your best disposition." (Whitehead, p. 155)

h. On February 24, 1982, two days before Nagle was scheduled to change his plea to the Suffolk cases before Judge Linscott, Nagle told Rosenthal that Spartichino, who had apparently received a summons, had promised he would "see [the] judge with Ridlon." Nagle was not transported on the 24th, however, so the hearing was continued and finally occurred on the 26th. After the plea, Rosenthal wrote that "Spartichino went to sidebar and agreed with my recommendation." (Ex. 121, p. 2566)

98. As noted above, Rosenthal's account is corroborated in several respects. Spartichino did indeed write to Nelson on Nagle's behalf on January 4, 1982, and copies went to Nagle's attorneys (Rosenthal in Suffolk; Juliar in Middlesex). The letter began with an acknowledgment "that Mr. Nagle has pursued a very active criminal life. Mainly due to a serious narcotics addiction, that was developed in Vietnam, while serving with U.S. Marine Corps." Spartichino wrote that he was contacted by Nagle "[i]n June of 1981" *[sic]*,[48] and chronicled Nagle's assistance in the Rodwell case, whose victim he was careful to note was the son of a Captain in a local police department. The letter concluded:

> James J. Rodwell was convicted of 1st degree Murder in November of 1981 and is presently confined to M.C.I. Walpole. In my opinion Mr. Nagle by corroborating, the imuned witness, was a key factor in the conviction. Needless to say he has been marked as a police informant and is in grave personal danger if he should be committed to M.C.I. Walpole, Norfolk or Concord. He is presently at the Greenfield House of Correction.

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[48]The defense understandably sees this as an admission that Spartichino was in touch with Nagle while the latter was still speaking with Rodwell. I rather believe that if this had been the case, Spartichino – who would know the Massiah rule and its consequences for the Rodwell conviction and potentially his own career if it were shown to have been breached – would have been more careful. The reference to June was, I find, a slip of the pen.

> I would like to request that Mr. Nagle's situation be considered in the most favorable light, due to aforementioned facts.
>
> Thanking you in advance for any consideration that you may be able to give Mr. Nagle. (Ex. 117)

99. I have no reason to doubt the running sheets' notations indicating that Spartichino spoke with Nelson, in person or by phone, on several occasions and urged leniency in the sentencing recommendation. Rosenthal's account of the conversation in which Spartichino expressed a feeling of obligation toward Nagle also rings true.

100. It is certain that Spartichino attended the Suffolk plea hearing on February 26. After the colloquy and the judge's acceptance of the change of plea, Nelson made his pitch for a sentence of 15 to 20 years, arguing succinctly and persuasively that with Nagle's record, he deserved it. Then:

> THE COURT: What do you say?
>
> MR. ROSENTHAL: Your honor, I am asking the court to consider a sentence of seven to twelve. I am not going to ask that he be put on the street. In addition to the material that was shown to you in the discussion we had previously, there is a gentleman who would like to approach the sidebar *with Mr. Nelson and myself, and Mr. Spartichino*. [Emphasis supplied]
>
> THE COURT: On or off the record?
>
> MR. ROSENTHAL: Off the record, if possible.
>
> THE COURT: All right, let's put it off.
>
> (Discussion at the bench not recorded.) (Ex. 25)

101. Back on the record, Rosenthal gave a brief rendition of Nagle's personal history, educational attainments, military service, work history, struggles with addiction, and the fact that "he

has never hurt anybody physically; there is not even so much as an assault or a dangerous weapon on [his record]." After a brief conference with the clerk, the judge imposed a sentence of "maximum term of twelve years and minimum term of seven years at the Massachusetts Correctional Institution at Walpole, to be served at the Franklin County House of Correction at Greenfield," all four sentences to be served concurrently. (Ex. 25; Ex. 121 at 2566)

102. From the transcript it is clear that Spartichino's pitch to Judge Linscott was off the record, but not *ex parte*: both counsel were present. There is, however, a persistent, 20-year-old rumor that Spartichino spoke with Judge Linscott *ex parte*, as Nagle had told Rosenthal he would.

103. Nelson gave an affidavit in connection with a prior new trial motion in this case in 1996. In the affidavit, he averred that Spartichino arrived in the courtroom and introduced himself to Nelson, who "agreed to let him address the judge." Nelson gave his sentencing recommendation (which he incorrectly remembered in the affidavit as 20 to 30 years); "Lt. Spartichino then went and spoke with the judge alone at the sidebar" with Nelson and Rosenthal left at the podium, unable to hear the conversation. Judge Linscott accepted Rosenthal's recommendation of 7 to 12 years, and "Lt. Spartichino immediately left the courtroom," leaving Nelson with a very bitter taste in his mouth. (Ex. 79)

104. Nelson testified at the evidentiary hearing in this (seventh) new trial motion. On direct, he said that he learned after the plea hearing that Spartichino had spoken to Judge Linscott *ex parte*, and that he was upset that Spartichino "had not spoken to me at all. ... So it was sort of, you know, going behind my back. I would have liked to have known what was going

on." He only learned after the fact, from Rosenthal, what Spartichino had told the judge, and that it pertained to a Middlesex case. A bit later, he acknowledged that he might have been in the courtroom at the time, but reiterated that he was not at a sidebar conference at which Spartichino was also present. He did not recall having received Spartichino's letter, dated January 4, 1982 and addressed to Nelson. (Nelson, pp. 28-41)

105. On cross examination, however, Nelson testified that in fact, he spoke with Spartichino before the hearing, that Spartichino said he was going to tell the judge about Nagle's cooperation, and that Nelson agreed to this. (Nelson, pp. 96-102) The transcript of the Suffolk plea hearing, moreover, is clear that there was no surprise, and no *ex parte* audience with the judge.

106. It is also highly probable, and I find, that Spartichino attended the abortive February 24 session and came back on the 26th. At some point, I would assume that Rosenthal made sure the judge had a copy of Spartichino's letter to Nelson, of which Nelson had the original and Rosenthal had a copy.

107. If Rosenthal's running sheets are to be believed, there was one *ex parte* contact with the judge, but not by Spartichino. The entry for February 26 begins, "I saw Judge in chambers and asked 8-10. Judge non-committal." (Ex. 121, p. 2566)

108. If this happened today it would be a breach of judicial ethics. Massachusetts Code of Judicial Conduct, Rule 2.9. The Code did not exist in 1982, but such a meeting would not have complied with the mores of that era, either. (Whitehead, pp. 118-22; see Olsson v. White, 373 Mass. 517, 533 (1977) ("[a] judicial decision brought about by ex parte communications with the judge has no place in our adversary system")) In any event: if

there was such a meeting, there is no credible evidence that Spartichino or anyone else from Middlesex County was complicit.[49]

109. There also is no evidence that Spartichino wrote to, or appeared before, the Parole Board on Nagle's behalf. The only evidence that he told Nagle he would is Nagle's inadmissible hearsay statement to Rosenthal on February 17, 1982. (Ex. 121, p. 2566) That Spartichino would represent, or Nagle would believe, that a State Trooper could engineer a release on parole from a violent felony after completion of one-third the bottom number seems highly unlikely. The rule back then was parole eligibility at one-third for nonviolent, but two-thirds for violent offenses such as armed robbery. (See discussion *infra*.) Even assuming (which I don't) that Spartichino made such a statement, moreover, there is no evidence that he made such a promise prior to the Rodwell trial; the first reference to it was three months later.

110. More troubling, partly because it is discussed in some detail over a period of time, is the reported "Dump Nelson" campaign. One can at least say that if there was such a campaign, it was covert and ultimately unsuccessful. Nelson testified that he received no pressure from the Suffolk DA's office to alter his sentencing recommendation, and had never heard of any effort to replace him on the Nagle case. (Nelson pp, 41-43, 56, 58-59) This is something he would remember, if it had happened. In fact, Nelson did not even receive

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[49]Nagle's statement to Rosenthal that Spartichino said he would "see [the] judge with Ridlon" is, like Nelson's rumor, second-level hearsay with no indicia of reliability.

pressure from above to alter his sentencing recommendation, which remained 15-20 to the end.[50] (Ex. 25)

111. Rosenthal's running sheets suggest that in October, 1981 Detective Rufo recruited ADA Beauchesne to look into having Nelson replaced; Beauchesne agreed to take the issue to Leary; Nagle may have asked Spartichino to pressure Suffolk authorities for a replacement; Spartichino learned of the effort but there is no evidence that he participated; and after discussions among management, Beauchesne let Rosenthal know on January 5, 1982 that "[w]e're not gonna touch it. Just gonna go through in the usual course of business," meaning that Nelson would remain on the case.[51]

112. From all of this, I find that if there was in fact a "Dump Nelson" campaign by Nagle's well-wishers – and I am skeptical – it was a Suffolk effort, instigated by Boston detectives who appreciated Nagle's help on May first; that it went nowhere; that Spartichino may have heard of it but did not participate; and that what he *did* do in Suffolk County was to write a letter (to Nelson with copies to others), and speak on Nagle's behalf (to Nelson and

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[50]In addition to several entries stating that Nelson was still recommending 15 to 20, Rosenthal noted in a January 8, 1982 entry to his running sheet, "Bob Nelson – got letter from Spartichino. Have heard nothing from Beauchesne or Leary to change recommendation." (Ex. 121, p. 2564) Five weeks later, not much had changed: "ADA Bob Nelson: recommendation is still 15-20, but to be served at Greenfield or anywhere D wants. Have talked to Paul Leary. Think people from MSC S/P talked to Paul prior to Bob, but recommendation not being changed." (Ex. 121, p. 2565)

[51]This and other efforts to assist Nagle in Suffolk County may have been hampered by the facts that there were Boston police officers who were and remained "real pissed" at Nagle's invocation of his Fifth Amendment right when he was called upon to testify at Steven Harr's probable cause hearing, and by Nelson's view, perhaps shared by others, that Nagle's "whole statement" on May 1 "led to nothing they could convict." (Ex. 121, pp. 2561-63)

perhaps to others in the Suffolk DA's office,[52] and to Judge Linscott at the plea hearing, off the record but not *ex parte*), just as he had promised he would and as was disclosed to Rodwell's attorney before trial.

2. **Middlesex County.**

113. Advocating for Nagle was easier in Middlesex, where the DA's office was fresh off a "win" in the Rodwell case, than in Suffolk, but given Nagle's abysmal prior record, it still required some effort. The Wilcox and Lake Street Drug case files had been passed around: ADA Michael McHugh was originally assigned to the case; when he left the office in June 1981, the files were transferred to ADA Mary Jane Walsh; and when she went out on maternity leave in late October, 1981 her husband, ADA John McEvoy, took over. (McHugh, pp. 14-15; Walsh, p. 132; McEvoy, p. Ex. 115, pp. 2531-33)

114. Neither McHugh nor Walsh remembered the Nagle cases. Juliar's running sheets do not mention any discussion with an ADA concerning sentence recommendations until December, 1981, when she apparently conveyed to McEvoy Nagle's suggestion of 4 to 8, to run concurrently with the Suffolk cases. Her notes do not reflect a response or a counter-

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[52]There are notations in the running sheets stating that Spartichino told Rosenthal that he would speak with Nelson, Brian Gilligan, Paul Leary, David Rodman (who promised to speak to Flanagan), Newman Flanagan, and Judge Linscott, and that he actually spoke to Nelson, Gilligan, Leary and Rodman.

Spartichino added on January 11, 1982 that Whitehead had also called Leary, at which Rosenthal griped "that Whitehead's participation hadn't been that great." This was likely a reference to a letter Rosenthal had written to Whitehead on July 24, 1981 in which he informed him that Nagle, who was now housed in Greenfield as he had requested, now wished to be transferred to Northampton. No reason was proffered. Rosenthal spoke to Whitehead three days later, and was told that he would have to make the request and that Whitehead "will do anything he can, but can't change the mittimus." This seems to have been the end of the discussion, and Nagle stayed in Greenfield. (Ex. 121, pp. 2560, 2563-66; Ex. 124)

offer, but it does appear that McEvoy was receptive to continuing the Middlesex case (as yet, there was only the Wilcox robbery / kidnapping charge) until after the change of plea before Judge Linscott in Suffolk, whose sentence a Middlesex judge might see fit to emulate with a concurrent sentence. (Ex. 115, pp. 2533-34)

115. McEvoy, on the other hand, *does* recall the Nagle cases, but not what his original sentencing position was. Whatever it was, McEvoy remembers receiving a visit from Spartichino, shortly after a hearing in the Wilcox case, and that Spartichino conveyed to McEvoy his dissatisfaction with the recommendation McEvoy had put forward. McEvoy was surprised, not being familiar with the Rodwell case and not understanding why Spartichino was taking an interest in this one. Sometime later, a prosecutor farther up in the DA's office chain of command – McEvoy did not remember who – instructed him to lower the recommendation, and he did. (McEvoy, pp. 58-63, 77)

116. Nagle called Juliar to tell her of the Suffolk disposition right after the February 26 hearing. Later in the day, he was transported to Cambridge. There, he signed jury waivers in Middlesex on the Somerville robbery / kidnapping case, which he had maintained all along was neither a robbery nor a kidnapping. (Ex. 115, p. 2525; Ex. 130, p. 2631)

117. The case was tried in its entirety that day, jury-waived, presumably with a stipulation as to witness testimony based on the probable cause hearing, or some such device. Judge Steele found Nagle guilty on both counts the same day. The matter was put over to March 30 for disposition. (Ex. 86; Ex. 115, p. 2534)

118. Nagle's April 18, 1981, armed robbery of the Lake Street Drug Store in Newton still had not been indicted; the Wilcox case was unresolved; and he still had the open case in

Brockton. Nagle and his attorneys were desirous of a global resolution of all of his outstanding cases that would fall in line with the Suffolk sentences. Once ADA McEvoy had received his instructions, the Middlesex DA's office was officially on board with such a resolution in recognition of Nagle's role in the Rodwell conviction.

119. After speaking with Juliar, McEvoy booked time in the grand jury, and the Lake Street Drug case was indicted on March 11, 1982. (Ex. 75; Ex. 86, p. 1750)

120. On March 18, Nagle pled guilty in Brockton on the stolen firearm case and was sentenced to one to two years, to run concurrently with the Suffolk sentences. (Ex. 115, pp. 2534-35; Ex. 133)

121. The sentencing hearing on the Somerville case took place before Judge Steele on March 30, 1982 as scheduled, and was combined with a change of plea on the newly indicted Newton case. The record does not include a transcript of the hearing, and it is likely that one was never prepared. Lt. Spartichino would certainly attended the hearing and probably spoke (or was prepared to speak) on Nagle's behalf; at the very least, the lawyers would have made the judge aware, orally and with a copy of Spartichino's letter to Nelson or one like it, of his assistance in securing the Rodwell conviction and, when it came to where he ought to do his time, his presumed unpopularity as an informant in Boston. On both cases, Nagle received Walpole sentences to 7 to 12 years, concurrently with one another and with "sentences now being served," the Middlesex sentence, like those in Suffolk, "to be served at House of Correction Greenfield." (Ex. 75, 86, 115 p. 2535)

122. One could certainly make the case that after the Rodwell trial, Spartichino advocated for Nagle, particularly in Suffolk County where it was needed most, more energetically than

anyone might have expected (except, perhaps, the self-serving and never bashful Nagle). As he told Rosenthal on January 19, 1982, he did so out of a sense of obligation for Nagle's assistance in securing a conviction in what had been an open-and-unsolved homicide case for more than two years. There is no evidence, however, that Spartichino had promised Nagle more than that he "would write to or inform the District Attorneys of Middlesex and Suffolk Counties of Mr. Nagle's cooperation in the" Rodwell case, as was disclosed prior to trial. (Ex. 96, 121 p. 2565)

E. Old Habits Die Hard.

123. When Nagle received his 7-to-12 sentences in February and March, 1982, he had less than a year's jail credit. (Ex. 86, p. 1753) Massachusetts "truth in sentencing" reform was, however, still a dozen years away. In the 1980s, a felon lucky enough to receive a "Concord sentence" could count on "parole eligibility arising after a small fraction ([as little as] one-tenth) of the stated sentence pursuant to parole board policies and regulations." Commonwealth v. Thurston, 53 Mass. App. Ct. 548, 554-55 (2002).

124. Nagle, who already had a lengthy felony record by the time he was sentenced in 1982, was not so fortunate – he received "Walpole sentences." Even so, he would still have been parole-eligible at two-thirds the bottom number for violent felonies (presumably including armed robberies), or one-third for non-violent crimes. Id. Parole eligibility dates could be accelerated even further with statutory "good time" credits. G.L. c. 121, §129, repealed by St. 1993, c. 432, §10); see Commonwealth v. Brown, 47 Mass. App. Ct. 616, 623 n. 10 (1999).

125. Nagle was therefore looking at several years, at least, of confined rustication in western Massachusetts. He did not, however, spend all of his free time in the exercise yard; nor did he abandon his commitment to bettering his penological lot by informing on others.

126. A year after he was sentenced, Nagle would appear in a federal trial as a government witness against two Lebanese heroin smugglers and their U.S. distributor, whom he had met in the Greenfield House of Correction in November 1982; whose stories he gathered; and with whom he had engineered a short-lived escape whose penal consequences, one might surmise, he wished to mitigate.[53] The case was United States v. Tamer Trad Mourad, *et al.*, U.S. District Court for the Southern District of New York, No. S 82 Cr. 769 (TPG)).

127. Nagle testified at the February-March, 1983 Mourad trial in Manhattan that he had been an DEA informant from May 1979 until February 1981, which he did purely for money and for which he was paid "roughly" $4,500. He did not contact the DEA after his April 1981 arrest, and did not ask the DEA to tell the sentencing judge in 1982 of his contributions; in fact, between February 9, 1981 (the date of his last payment by the DEA) until his involvement with Mourad *et al.*, the only information he gave to law enforcement was in the Rodwell case. (Omitted was the May 1 session in the Brighton lockup with the Boston detectives).

128. In the Rodwell case, he said, he made contact with a lieutenant in homicide (Spartichino) through a police sergeant they both knew (McDermott). Nagle provided additional details which fit with the testimony he had given at the Rodwell trial: he did not meet with

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[53]If Nagle ever was charged with the escape, it never got as far as an arraignment. (Ex. 133)

Spartichino until July 9, after Rodwell tried to enlist him as a perjurer in a capital case. By then, he had already arranged a transfer (but not a ride) to Greenfield; he knew that by providing information he would be helping himself; and that all Spartichino promised him was a letter. When the time came to change his plea, the Suffolk DA was still recommending a sentence of 15 to 20 years, but police involved in the Rodwell case advised the judge of his cooperation and asked him to consider it in sentencing.

129. Nagle also testified that when he met Rodwell he had been out of touch with the DEA for several months, that the DEA played no role in his sentencing, and that he did not make contact again until late November 1982, after he met Mourad and his associates. He would be up for parole in March 1986, and the office of the U.S. Attorney for the Southern District had promised to write a letter to the parole board. (Ex. 97, pp. 2157, 2195-99, 2206-087, 2221-39, 2257-65, 2272-75)

130. Nagle also testified in a June, 1984 trial in federal court in Springfield against three defendants named Quinlivan, Deyo and Murphy. United States v. Steven Quinlivan, *et al.*, U.S. District Court for the District of Massachusetts Criminal No. 84-103-F. First, however, a DEA Special Agent named Edward O'Brien testified that earlier that year he had contacted "a cooperating individual who was in the Greenfield area," hoping for an introduction to suspects involved in trafficking Dilaudid in western Massachusetts. The cooperating individual was Nagle, whom O'Brien had met in Manhattan in November, 1982 while he was there in connection with another case (presumably, the Mourad investigation).

131. O'Brien was in touch with Nagle regularly after the November 1982 meeting. He first used him as an informant in mid-August, 1983, when Nagle was on furlough from the Greenfield

House of Correction. The two were in weekly telephone contact thereafter. Nagle introduced O'Brien to several truck drivers, including Deyo. Later, Nagle arranged a meeting for O'Brien with Deyo for February 15, 1984 (a Saturday) when Nagle was again on furlough.[54] O'Brien, under cover and wearing a wire, first met with Deyo in his car, with Nagle sitting in the back seat, and purchased 35 Dilaudid pills for $1,000, paid up front. He brought Nagle to a second meeting later the same day with Deyo, Murphy, and Murphy's wife, at which he received the Dilaudids from Deyo,[55] exchanged contact information, and promised future business. (Further purchases followed, but evidently without Nagle's further involvement.)

132. All told, O'Brien testified, he met with Nagle on three furlough days while at Greenfield. O'Brien compensated Nagle monetarily for his time on furlough and had written, by the time of trial, a letter to the Parole Board detailing his cooperation. By the time of trial, Nagle had been moved to Essex County for safety reasons. (Ex. 81, pp. 1333-69, 1443-1502, 1545-77, 1608-10)

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[54]The weekend furlough was another feature of Massachusetts penology later consigned to the dustbin of history. In this instance, it was due to its misuse by one Willie Horton, a Massachusetts prisoner convicted of first-degree murder who was furloughed from the Concord farm on June 6, 1986. He failed to return on Sunday night, and was on the lam for ten months before committing a violent home invasion / ABDW / kidnapping / rape in Maryland. Horton was convicted and sentenced to two consecutive life terms plus 85 years and, together with a certain M1 Abrams tank, may have influenced the outcome of the presidential election of 1988.

[55]O'Brien explained that Quinlivan obtained the pills from pharmacists, then wholesaled them through the Murphys to Deyo, who sold them to O'Brien.

133. Nagle was called by the defense and accompanied by an attorney. His testimony generally corroborated, and elaborated somewhat upon, O'Brien's. Neither side asked Nagle or O'Brien anything about the Rodwell case. (Ex. 81, pp. 1622-1702)

134. Although O'Brien testified that he paid Nagle in cash, [REDACTED].

a. On February 23, 1983, just before the Mourad trial, he received [REDACTED] to assist his wife and daughter, who (Nagle testified in Mourad) had received an unwelcome visit from an armed crony of Mourad et al., and wished to relocate to somewhere safer. (Ex. 97, pp. 2276-77, 2290-92; Ex. 162A)

b. [REDACTED]

135. [REDACTED] (Ex. 162A)

136. In the meantime, Nagle – who must have accumulated good time credits at a prodigious rate, the Mourad escape notwithstanding – was paroled and back on the street sometime before February 11, 1985, almost a year less than two-thirds of seven years starting in April 1981. On that day he was arraigned in Brookline District Court on a charge of larceny from a person. This was followed by arraignments in April, May and June in Barnstable, Brighton, Newton, and federal court on a long string of familiar offenses – possession of a hypodermic needle, receiving stolen property (x2), larceny of a motor vehicle, and nine armed robberies (in the federal case, of a bank), some using a sawed-off shotgun. Nagle's parole was revoked, and the district court cases were indicted later the same year.

137. At a plea hearing in Suffolk on October 4, 1985, the Commonwealth recommended a Walpole sentence of 15 to 20 years. Nagle's attorney represented to Judge McGuire that his client had "made statements and made himself available to agents from the drug

Enforcement Agency, the Alcohol, Tobacco and Firearms Agency, the Federal Bureau of Investigation, the State Police and the Boston police. Counsel had spoken to a Boston detective (Sullivan) and two state troopers (Cronin and Cox) and there appeared to be consensus that the defense recommendation of 10 to 12 years "was about right." There was no mention of Spartichino, the Middlesex CPAC unit, or James Rodwell. The Parole Board, counsel reported, had informed him that in view of Nagle's parole violation on Judge Linscott's sentences, "they would not look kindly on any future parole considerations"; i.e., that Nagle "is not likely to be paroled" on whatever sentence the judge might see fit to give. Judge McGuire imposed concurrent sentences of 12 to 20 years on each of the seven armed robberies in Suffolk. (Ex. 31)

138. Nagle pleaded guilty to the Middlesex cases on July 2, 1986 before Judge Elam, where he didn't fare even as well as he had in Suffolk. In the first of two criminal episodes, he had acquired two counts of armed robbery; in the second – a series of assaults on MBTA employees and riders at the Riverside T stop – charges of armed robbery, armed assault to rob (two counts), and assault with a dangerous weapon. The Commonwealth recommended a sentence of 21 to 25 years concurrent with the sentences he was then serving, plus a from-and-after life sentence, suspended. Nagle's counsel recommended a sentence of 15 to 20 years, concurrent.

139. Again there was a sidebar discussion, this time on the record and unimpounded. Nagle's attorney stated, "as we discussed in the lobby," that "Mr. Nagle has on many occasions assisted the government in the prosecution of [a] murder case and some drug cases," adding

that he had received calls from law enforcement officers, state and federal,[56] "expressing their familiarity with Mr. Nagle and asking me to inform the Court of their interest, hoping that the Court will give him consideration for his involvement in the past." He added that some of the officers had been there that morning and had spoken with the prosecutor. Judge Elam replied, "All right. The record will also state that the Court is not impressed by the fact that the police officers are speaking in his behalf." He found the Commonwealth's recommendation "rather a lenient one," but accepted it, adding "I think he needs to be put away for the rest of his life and I do mean life." The period of suspension of the life sentence was five years. (Ex. 32, 133)

140. Excepting the federal case, however, Nagle was still in the pre-truth-in-sentencing era. The 21-to-25 sentence and the Parole Board's 1986 admonition notwithstanding, he was back in business in or before September 1998, and began a new cycle of arraignments, convictions, and sentences.

141. This time, however, Nagle was operating under the 1992 "truth in sentencing" law. (St. 1993, c. 432, eff. July 1, 1994) The new offenses, and especially the imposition of a life sentence for armed robbery in the Franklin Superior Court and a probation violation triggering the 1986 suspended life sentence in Middlesex, would keep Nagle behind bars until his death in December 2012.

142. By this time, Nagle had attracted some attention in the press. In the summer of 1989 the *Boston Phoenix* carried an installment series on Nagle and his role in the Rodwell trial, a

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[56]Counsel did not name the officers, and there is no evidence that Lt. Spartichino was among them.

copy of which was submitted with the Fourth Motion for New Trial. (Ex. 13, pp. 458-68) In its March 1991 issue, *Boston Magazine* published an article by reporter John Strahinich about David Nagle and the Rodwell case, succinctly titled "Snitch." (Ex. 107) Both are entertainingly written (largely, at Nagle's expense), but neither makes it past first-level hearsay, and so I have not relied on either in these Findings.

G. Nagle's Later Statements.

143. As noted above, however, I have paid attention to statements Nagle made while still living, particularly concerning the Rodwell case, for impeachment purposes only (the Drayton rule being inapplicable to these). The pickings, however, are slim.

1. Communications with the Court.

144. With the passage of time, Nagle chafed under Judge Elam's 21-to-25 sentence. A "Motion to Reconsider Sentence" in 1991 went nowhere, notwithstanding a personal letter from Nagle addressed to Judge Catherine White and touting his assistance to members of the state / federal Bank Robbery Task Force while he was being held for trial, and all the assurances he had received that sentencing would be "'no problem.'" There is no mention of the Rodwell case or the events of 1981. (Ex. 33, 100)

145. Much later, on December 17, 2006, Nagle wrote to the District Attorney for Middlesex County, reading as follows:

> Dear Sir; my name is David Nagle. I am now serving a life sentence for parole violation of which I've served 23 years. My deal to testify in a murder case and a Federal Court on some international issues. My deal was that I would not be put in "harm's way" but D.O.C. is going back on their word. I am dying of liver failure. I never killed anyone except my drug using killing myself. I need your office to appoint a attorney so I can go forth with a revise + revoke. I hope

> you can help because if D.O.C. doesn't live up to the bargain I'll have to go back on my deal.

The letter does not detail how the DOC was putting Nagle in harm's way, or specify what "go[ing] back on my deal" would entail. If the latter meant going back on his testimony in the Rodwell case, or assisting Rodwell with his efforts to have his conviction overturned, he never did.

2. Communications with Rodwell and CPCS Attorneys.

146. Beginning in the late 1980s, Nagle's attorneys received requests from several prominent defense attorneys (Stephen Rappaport, who had represented Rodwell on the direct appeal; Kevin Reddington, who handled several of Rodwell's new trial motions and habeas corpus litigation), and Timothy Bradl), seeking information that might fortify Rodwell's claims that Nagle (a) had been acting as a government agent when he spoke with Rodwell in Billerica, and/or (b) that the promises, rewards and/or inducements extended to him had been more extensive than the Commonwealth had represented at trial and before. (Ex. 130, 143; Silverman)

147. These overtures foundered on the issue of attorney-client privilege, and Nagle's unwillingness to waive it. Rosenthal's response to Rappaport's April 26, 1989 letter, which mentioned the Suffolk 1982 plea hearing whose transcript suggested that an unidentified individual had accompanied counsel and Spartichino at the off-the-record sidebar conference, stated that he (Rosenthal) had no recollection of such an individual, and that the attorney-client privilege and ethical responsibilities prevented him from providing any "further assistance." (Ex. 143, 144)

148. Similar efforts by Reddington in 2004-09 (Ex. 18, 19, 52), Bradl in 2010 (Ex. 53, 130), the press (Ex. 130), and Rodwell himself (directly to Nagle) in 2008-10 (Ex. 55) likewise failed to dislodge Nagle's attorney-client privilege.

149. Rodwell's first letter is missing from the record, but from the others (two letters by each between July 5, 2008 and April 8, 2010), it is evident that Rodwell believed that Nagle "got a deal, or [was] promised something for testifying," and he wished Nagle to put it in writing. He sent affidavits for Nagle to sign, and suggested that Nagle might instead sign a waiver of the attorney-client privilege and allow Rodwell's newest counsel to see the files of Nagle's attorneys "because it appears that there are in fact notes in the files showing the deal you got." (Ex. 55 at 1047)

150. Nagle's responses were elliptical, but he did write (after complaining of "bull[ying]" by an investigator who had visited him on Rodwell's behalf), "You want the Suffolk paper work? They wanted to give me 15 - 20 they asked for it. I had a good judge Linscott. I don't see how it will help you." (Ex. 55 at 1046)

151. With the escalation of the issue in 2009, CPCS appointed counsel (initially, Andrew Silverman; later, Benjamin Keehn) to represent Nagle's interests. (Ex. 130; Silverman, p. 19)

152. In June, 2011 Atty. Veronica White took the case over from Bradl, and contacted Silverman. Nagle was suffering from end-stage liver disease (the result of hepatitis that he had contracted in the 1970s, presumably a legacy of his intravenous drug habit), and knew he had not much longer to live. Through Silverman and Keehn (the latter replacing Silverman when he retired), she negotiated two things: a recorded interview of Nagle, not to be

released until after his death, and a written waiver of the attorney-client privilege and confidentiality, also effective upon his death. (Ex. 64, 98)

153. The interview took place on May 25, 2012 at a hospital bed in Bridgewater State Hospital; there is both an audio recording and a transcript. (Ex. 98, 98A) Upon Nagle's death on December 18, 2012, the originals of the Mass. Defenders files and running sheets were provided to Atty. White for copying, along with copies of CPCS running sheets for Silverman and, eventually, for Keehn. (Ex. 114-30; Ex. 163, pp. 16-17) Together, they provide a good deal of information (and perhaps, some misinformation) from Nagle himself that was unavailable to Rodwell's prior counsel.

154. At their first meeting on March 25, 2009, Nagle told Silverman

> that he testified truthfully at Rodwell's trial; that there was no deal other than that his cooperation would be made known to the judge in his own cases; and that he was not working as a police agent to elicit a confession from Rodwell.

(Ex. 130, p. 2619)

155. The next (July 13, 2010) meeting in person was at Bridgewater State Hospital, where Nagle had been transferred for treatment of his liver disease and where he would remain, except for occasional admissions to New England Medical Center, until his death. Silverman read to Nagle (who did not have his reading glasses) two draft affidavits that Rodwell's new counsel (Timothy Bradl, replacing Kevin Reddington) had proffered.

> As to the first of Rodwell's proposed affidavits for DN to sign (i.e., the one that says DN was working as an agent of law enforcement and getting promises and consideration not disclosed to Rodwell), DN says that it is "way off base"; it would be "a lie to sign it" and he refuses to sign it because it is "untrue."

****

> DN was adamant that he had no deals with law enforcement to troll for evidence/confessions whenever he was arrested. He says that from 1975 to 1981 he stayed out of trouble, and had no relationship with the police. ... He insists there were no agreements with law enforcement; no quid pro quo; not even any "nods & winks" (my words). He does say that he "knew the score" - i.e., if you are arrested and want to help yourself out, you can give the police/prosecution information about other people. DN insists, "I had no love for the cops."

(Ex. 130, p. 2631) This theme was reiterated, when the subject came up, in conversations with Silverman and Keehn on June 27, 2011 (Ex. 130, pp. 2650-51), and with Keehn in more general terms on June 30, 2011, July 21, 2011, October 18, 2011, and March 21, 2012. (Ex. 163, pp. 1, 2, 3, 9, 13)

156. There were other details concerning the lead-up to the Rodwell trial, as seen through Nagle's eyes. At the July 13, 2010 visit, Silverman wrote,

> Toward the end of our meeting, as we continued to talk about DN's contacts with the police, DN stated that two state troopers, "out of Spartachino's *[sic]* office" at CPAC, came to speak to him in the lockup in Brighton District Court in May, 1981. DN says they told him that they were going "to pinch" DN's wife ("Missy") as an accessory to a scheme to murder Frankie Holmes unless DN helped them get Rodwell. The cops said that they had heard about there being a "contract" on Holmes and "rumblings" that Missy was involved; that they would "hate to see your daughter be without her mother"; that they hoped DN "wouldn't use Missy." DN says the troopers "wanted to know a whole plethora of things."
>
> DN says that he does not recall the names of the two troopers, nor does he recall the exact date of this conversation. I went over the dates in Marty Rosenthal's runsheet with DN, and DN said that it was probably his May 18, 1981, appearance in Brighton District Court. He was clear that it was May, 1981, and clear that it was prior to him contacting Spartachino in June, 1981, to report Rodwell's admission to him. DN says he had been talking with Rodwell at Billerica HOC about arranging for "a hit" on Holmes, and DN had made some calls and sent information through "Missy"

> to try to set it up. He figured that's how the cops came to know about it.
>
> I told DN that this was precisely the type of thing for which Rodwell and Bradl were looking – i.e., an agreement between DN and the police to get Rodwell by getting Rodwell to make incriminating statements. DN says he did not agree to do this for the troopers. Instead, he says that when the cops said this he (DN) "shined them on" – i.e., he denied knowing anything about any plan to kill Holmes; he figured "they had nothing"; "there was nothing there." When I asked what he meant, DN explained that he figured if they had any evidence of a plan to kills Holmes and Missy's involvement in such a plan, the police would have charged people, not come seeking his assistance; that they were "casting a big net"; that if the "jab" about Missy was serious, the police would have done something.
>
> DN denied that he agreed to work for the troopers to get evidence against Rodwell, but he said that he believed after this conversation that if he brought them such information it could help protect Missy, if that proved to be necessary, and could help him on his own cases. DN says the two troopers gave him a telephone number to call at the DA's office to contact Spartachino with information. It was the main number for the DA's Office. DN says when he later did contact Spartachino, in June, 1981, it was done through DN's friend Brookline Sgt. Billy McDermott. DN says he wasn't about to call the main number at the DA's Office and ask for Spartachino.

Nagle repeated the account (more or less) to Silverman and Keehn nearly a year later, during a visit on June 27, 2011.[57] (Ex. 130, pp. 2632-33, 2651; Keehn, pp. 136-44) He did not mention it, however, in the recorded interview on May 25, 2012, instead insisting repeatedly that Spartichino was his only police contact in the Rodwell case. (See below and Ex. 130, pp. 2314, 2316, 2319, 2322, 2324)

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[57]He did not relate this anecdote in his recorded interview on May 25, 2012. When Keehn asked him afterward who not, Nagle told him it was "because he did not want to give information that might get Missy involved." (Ex. 163, p, 19)

157. Nagle had not, of course, included the "get Rodwell" anecdote in his testimony at the Rodwell trial. Even if it were admissible substantively, it seems improbable – certainly, inaccurate – for several reasons.

158. The May 18 date, at least, is certainly wrong. Rodwell was not arrested, and so did not arrive at Billerica, until May 22, 1981, so Nagle could not have been "talking with Rodwell at Billerica HOC about arranging for 'a hit' on Holmes" on the 18th. Just as important, the supposed plan to "get Rodwell" would have been premature at this pre-arrest juncture; more like a plan to "tip Rodwell off."

159. There is no evidence in the Brighton District Court records (Ex. 108), in the Juliar and Rosenthal running sheets (Ex. 115, 12), or anywhere else in the record that Nagle had an appearance in Brighton District Court *after* May 18. This is unsurprising, since he was to be indicted on the Suffolk robberies just three weeks later, on June 8. (Ex. 110).

160. The idea that such an errand would be entrusted to two CPAC troopers "out of Spartichino's office" who paid him a visit is likewise implausible, given Spartichino's work habits. He was a loner, not a delegator, even as to the mundane aspects of criminal investigation. Even if one assumes (which I do not) that Spartichino would stoop to arranging a false arrest in order to leverage a Massiah violation, I doubt very much that he would have trusted such a risky and potentially career-ending errand to underlings, who might spill the beans.

161. By the time Nagle was speaking with Silverman, he was a very ill man who by his own account was susceptible to periodic bouts of biochemically induced dementia (see *infra*). Twenty-nine years had passed since the events in question. Others had been soliciting his aid in proving a Massiah violation, raising the possibility of suggestion.

162. Finally, there is the fact that according to Nagle's account to Silverman -- the only mention anywhere in the evidence of a visit by Spartichino's men – he made no agreement with them, "articulated" or otherwise, to get evidence against Rodwell.

163. In short: the supposed "get Rodwell" plot exists only in hearsay[58] that lacks the indicia of reliability that would qualify it under the Drayton rule. Even if it were true, it would not have amounted to an "articulated agreement" to get a statement from Rodwell. Because I do not find it credible, I have not considered this anedcdote even for impeachment purposes.

3. The Recorded Interview (May 5, 2012).

164. As noted above, Nagle's recorded interview took place on May 25, 2012. It had been postponed from a tentative date of May 8, because he had told Keehn he was feeling "loopy" due to elevated ammonia levels in his blood, and was starting a 21-day regimen of IV treatment to get his T-cells up. The day before the interview (which Nagle had thought was the day *of* the interview), Nagle told Kechn that "he has encephalopathy, forgets things easily at times, and that when his ammonia level is high (as a result of failing liver) he gets very confused." (Ex. 163, pp. 18-19)

165. Nagle began the interview[59] by telling White,

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[58]Rodwell suggests that the statement was against Nagle's penal interest and so constitutes an exception to the hearsay rule. I disagree, for two reasons. (a) Nagle made the statement privately to his attorney, having taken pains to ensure that the attorney-client privilege would remain intact until his death, at which time he would no longer face the possibility of prosecution. (b) The statement also fails the requirement, in a criminal case, that "'the statement, if offered to exculpate the accused, must be corroborated by circumstances clearly indicating its trustworthiness.'" Commonwealth v. Drew, 397 Mass. 65, 73 (1986) (citation omitted).

[59]I have focused here on what Nagle said concerning the Rodwell case. He also answered questions about his DEA career, the Mourad and Quinlivan cases, and other topics, none of

> My name is David Nagle, and I'm doing a life sentence. I'm suffering end-stage liver disease, with endo encephalopathy (phonetic), and it causes me to lose faculty, you know, it's happened in the last few years. I pass out. I go into comas-like stages. That's all. So it's not that bad. I'm trying to avoid anything that's, you know, I'm truly very ill, (indiscernible), you know, something like that. (Ex. 98, p. 2310)

The truth of this assertion is apparent in the transcript, and infinitely more so in the audio recording.

166. Nagle said that he was concerned that Rodwell had asked him to testify falsely that Holmes had confessed to the Rose murder, and "I said, 'it looks like a perjury, you know, and with my record, I'll get slammed,' and I didn't want to testify for Jimmy. I wasn't gonna throw away my life" by complying. He called William McDermott at home for advice. McDermott said he'd find out who was investigating the Rose murder, "and then Spartichino showed up" when he was at the Suffolk courthouse.[60] (Ex. 98, pp. 2314-21, 2396-98, 2413-16)

167. Nagle remembered the initial visit from Spartichino as occurring in July or August. He gave Spartichino "a brief statement in Suffolk Superior *[sic]* lockup," then the stenographically recorded statement in Greenfield. (Ex. 98, pp. 2320-21, 2389) Spartichino was the only law enforcement figure he dealt with in the Rodwell case, other than a brief conversation

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which shed light on the issues before me other than to verify that for the 1982 trip to New York where he met O'Brien, he was not on furlough but transported by U.S. Marshals and housed in the Manhattan Correctional Center (pp. 2341-42); that the marshals bought him a cheese steak sub on the way back, not a steak dinner has had been rumored (2401-03; see Ex. 100 at p. 2427); and that his release in 1985 was due to good time applied to his parole-eligible date (p. 2349).

[60]This was a variance from Nagle's testimony at the Rodwell trial, where he said that Spartichino's first visit was on July 9 at Billerica. (TTr. v. 4 p. 142)

on the day of his testimony with First Assistant Howard Whitehead, who told Nagle "'just tell the truth,' and all that nonsense. And I said okay." (Id., pp. 2315-22) Nagle insisted that he told the truth in the Rodwell trial. (2414)

168. Asked by his own counsel about "the theory that you were put in there, in Billerica, in order to ... extract info – a confession from Rodwell," Nagle replied, "That's the most idiotic thing I ever heard." He remembered giving a statement to Boston detectives Pacino, Rufo and "Kilroy" at Brighton District Court lockup before he'd met Rodwell, but denied being offered any promises, rewards or inducements with respect to the Rodwell case. (2366-79, 2389)

169. Nagle said he met Frankie Holmes in Billerica, "[b]ut I had no conversation with him whatsoever. He was gone in two days." He did, however, speak with Rodwell, who said he was charged with murder because he "put seven in the guy," and that he was "going after" Holmes. (Id., pp. 2353-59) He remembered giving a statement to Boston detectives Pacino, Rufo and "Kilroy" at Brighton District Court lockup before he'd met Rodwell, but denied being offered any promises, rewards or inducements with respect to the Rodwell case. He rejected the suggestion that his transfer to Greenfield was held up so that he could get a statement from Rodwell. (2366-79, 2387-89)

170. Asked if he received anything in exchange for informing while he was in Billerica in 1981, Nagle replied, "Well, Spartichino said he'd speak on my behalf. That's the extent." "The truth is that Spartichino said he'd speak on my behalf. He did that. That's the end of the story." Nagle interpreted this to mean "That he'd go to the DA probably, the guy that's handling the case." Spartichino "had the reputation of being a straight shooter, and that's

how I took that, he'll speak for me. I figured I would have ended up with a twelve-to-twenty." Spartichino's promise, Nagle said, was made after he testified, "I think."[61] (Id., pp. 2362-66, 2399-2400)

171. Nagle acknowledged that Spartichino helped with the move to Greenfield: "Yeah. He drove me – there was no transportation – The sheriff didn't want to waste all the gas, or something." (Id., p. 2399) When Atty. White suggested that there must have been more to it than this, Nagle told her, "You're trying to make prime rib out of fifty-nine-cent hamburger." (2409)

172. Nagle remembered that he tendered his 1982 Suffolk plea to Judge Linscott; that ADA Nelson was recommending 15 to 20 years; and that Rosenthal, Spartichino and Nelson – but not another man – attended the sidebar conference. (Ex. 98, pp. 2376-84)

173. Near the end of the interview Nagle said, as he had earlier, that he was able to contact Spartichino because he asked William McDermott to find out who had the Rodwell case. He stood by this after having been read the McDermott affidavit, in which McDermott denied having facilitated the introduction.[62] (2391-98)

174. Two and one-half weeks after the interview, Nagle received word that the Parole Board had voted 5-2 not to recommend compassionate release. Keehn wrote a letter to the Governor,

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[61]This statement was at variance with Nagle's testimony at trial, in which he said that although Spartichino, at their first meeting on July 9, 1981, "was quite emphatic" that he could make no promises, "[h]e said he would speak on my behalf, and write a letter" concerning Nagle's cases – four armed robberies in Suffolk county and two more in Middlesex. (TTr. v. 4 pp. 119, 141-44)

[62]Nagle was also asked at some length about assistance he provided the DEA's Eddie O'Brien in the Quinlivan case, and his testimony in the Mourad case, discussed briefly below.

but ninety days went by with no action. This meant that the Board's decision would stand. Nagle grew sicker, and died on December 18. (Ex. 163, pp. 14-16)

175. Nagle, who had received a prolonged hands-on education in the criminal law, understood that if he admitted to having perjured himself at the Rodwell trial, a capital case, he could receive a life sentence. (Chase, p. 91; see G.L. c. 268, §1) Toward the end, he was seeking compassionate release from the Parole Board, and understood that such an admission could affect that as well. (Ex. 130; Ex. 163, p. 6; Silverman, pp. 25-27)

176. That Nagle may have had an incentive not to admit that he had perjured himself in the Rodwell trial is not, however, compelling evidence that he did. There is, in short, little impeachment material of any value in Nagle's own post-trial statements, and what there is seems fully attributable to illness and memory loss.

H. William McDermott's Testimony.

177. In connection with this seventh Motion for New Trial, retired Brookline detective William McDermott, at the request of the defense, signed an affidavit averring that "David Nagle did not contact me regarding a murder in Somerville or anyone who had confessed to a murder in Somerville," and that McDermott "did not put David Nagle in touch with Lt. Thomas Spartichino of the Massachusetts State Police at any time, especially between April-July, 1981." He added that if Nagle had made such a request, he (McDermott) would have paid him a visit to confirm the allegations before putting him in touch with another detective.[63] (Ex. 99)

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[63]McDermitt also averred, "I never visited David Nagle at the Greenfield House of Correction." Confronted with this in his Bridgewater interview, Nagle replied (correctly, so far as the evidence shows), "I never said he did." (Ex. 99, p. 88)

178. McDermott appeared on the second day of hearings on this motion. He testified that he arrested Nagle in the 1970s and several times thereafter. Out of this came a relationship in which Nagle would provide McDermott with information concerning crimes by others. If Nagle had information about criminal activity outside Brookline, McDermott would relay it to the appropriate law enforcement agency. Occasionally – McDermott thought six to eight times – Nagle would call requesting names and/or contact information for other agencies. (McDermott, pp. 7-10, 29)

179. There was a social aspect to the relationship as well; sometimes, McDermott said, the two would get together just to "shoot the crap about different things." (McDermott, p. 24)

180. It was McDermott who introduced Nagle to a DEA agent with whom McDermott had worked cases, and who would become Nagle's DEA handler. (McDermott, p. 10)

181. When Nagle was incarcerated in Greenfield, however, McDermott "told him not to contact me. I had no more use for him," because "he wasn't current. He wasn't local. I didn't want to hear about events going on in the western part of Massachusetts. There was just no reason for us to stay in contact." On cross examination, there was the following exchange:

> Q: Was there ever a time when your relationship with Mr. Nagle was not about you being a police officer and him being somebody who could provide you with information?
>
> A: Oh yeah, plenty of times.
>
> Q: And were there times when you continued your friendship even though he could no longer provide you with information?
>
> A: Yeah, yes.
>
> Q: He stopped providing you with information, you said, when he was incarcerated out in Greenfield. Is that correct?

A: That's correct.

Q: And did you continue to speak with Mr. Nagle even after he was out in Greenfield?

A: No.

Q: So after he was unable to provide you with information, you stopped having contact with him?

A: My feeling was because of his location as from an intelligence gathering point, he wouldn't be valuable. He wasn't in this area. Whatever he heard was affected by that area. I – we just – I had kind of given up on him because he kept going back to jail. So I broke our relationship.

(McDermott, pp. 8-9, 31)

Omitted from this testimony was the fact that apparently, McDermott was still taking Nagle's calls at least as late as 1985, when he was back on the street robbing pharmacies.[64]

182. McDermott testified at the motion hearing that Nagle once gave him information about a murder, but that all he could recall was that it was a shooting. He didn't remember it was in Somerville (he thought maybe Charlestown); he didn't remember the name Louis Rose; and he never heard the name Rodwell until "I got served with a paper the other day to come to court." (McDermott, pp. 25-26)

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[64]McDermott provided an affidavit in 1991, for use in the Commonwealth's opposition to David Nagle's Motion to Reconsider Sentence and his Motion for New Trial, pertaining to his July 2, 1986 guilty plea before Judge Elam. He averred:

> In or around the spring of 1985, the defendant David Nagle contacted me. At that time, David Nagle was charged with several armed robberies in the greater Boston area. The defendant asked me which law enforcement agency he should go with, to work with, in an effort to receive favorable consideration in the several pending cases he had at that time. At that time, I told Nagle that he should go with whoever he felt most comfortable with. (Ex. 23, pp. 649-50)

183. This last seems especially suspect. The Rodwell case received a fair amount of media attention in the years following the conviction. Nagle's role in it, and the fact that it was McDermott who connected Nagle with Spartichino, received prominent mention both in Boston Magazine's 1991 "Snitch" article[65] (Ex. 107, pp, 2475-77) and the earlier *Phoenix* series[66] (Ex. 13, p. 462).[67] McDermott would have known most or all of the other law enforcement officials – including his own DEA contact to whom he had introduced Nagle – who were mentioned in and/or interviewed for both articles. The odds that no one passed him a copy when it came out, or that he later forgot the whole thing, seem long indeed. I do not believe it.

184. McDermott did remember a visit from an investigator and signing an affidavit, but claimed not to remember what it was about. With the affidavit placed in front of him, however, McDermott said – softly, uneasily (it seemed to me), and unconvincingly – that the affidavit was "true," and that it was "[c]orrect" that he had not put Nagle in touch with Spartichino in 1981 regarding the Rose murder. (McDermott, pp. 25-28)

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[65]When he "began to have second thoughts" concerning Rodwell's recruitment of him to testify falsely that Holmes had admitted to being Rose's shooter, "Nagle needed some advice and turned to his 'rabbi,' William McDermott, who in turn put him in touch with Thomas Spartichino." (Ex. 107, p. 2477)

[66]"Nagle – who had been in the Billerica lockup since late April 1981 awaiting trial for a string of armed robberies – got involved in Rodwell's case in early July by contacting an old acquaintance who had arrested him for armed robbery, a Brookline cop named William McDermott. McDermott arranged for Nagle to speak to Spartichino." (Ex. 13, p. 462)

[67] The Snitch article reported that "McDermott failed to return numerous phone messages left for him at headquarters." (Ex. 107, p. 2475)

185. If McDermott did not arrange the meeting between Nagle with Spartichino, that would leave the questions: who did, and why did Nagle testify falsely, presumably with Spartichino's blessing,[68] that it was McDermott who made the introduction?

186. The defense has posited that the that the connection could have been made either by the CPAC detectives who Nagle would much later claim came to see him in the Brighton lockup on May 18, 1981, or alternatively, that Detective Oteri might have made the introduction. I have given careful consideration to both theories, but I do not find either to be credible.

187. Nagle's account of the visit from the pair "out of Spartichino's office" is, if believed, troubling on several levels. As discussed above, however, I find Nagle's story unlikely, and it undoubtedly lacks the indicia of reliability that would permit a relaxation of the hearsay rule pursuant to the Drayton rule.

188. That the introduction was made through Detective Oteri is similarly unlikely. To be sure, Oteri and Nagle had met one another in the fall of 1980. (See ¶¶29-36, *infra*) As noted above, Spartichino would have known Oteri who, having been part of the team that effected Rodwell's arrest, would likely have known or assumed that he was being held without bail in the Billerica jail. Oteri might conceivably have learned from the DEA that Nagle had been deactivated on May 15, 1981 because he had been incarcerated for a string of armed robberies, and he might have learned that Nagle, too, was housed in Billerica. He could

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[68]Spartichino, as the lead investigating officer, was present at counsel table during the trial, a custom that persists in homicide cases to this day. (TTr. v. 3 p. 9) There is no suggestion in the transcript that he left during Nagle's testimony.

have told Spartichino, and either one of them might have hatched a plan to recruit Nagle to tease a confession out of Rodwell.

189. "Might have" and "could have," however, don't cut it, either in trials or in new trial motions, particularly where the theory's proponent has the burden of proof. There is simply no evidence that Oteri introduced Spartichino to Nagle, or that the two had the sort of close and trusting relationship upon which potentially career-ending conspiracies depend.

190. Being a Middlesex County investigator, Spartichino was undoubtedly in Billerica from time to time. He was there for certain on May 4, 1981, taking Holmes's statement, when Nagle was already there. This does not, however, make it likely that he found Nagle on his own and recruited him as an agent.

191. In short: I do not credit Detective McDermott's denial that he made the call for Nagle to Spartichino, and I have been presented with no credible evidence that the introduction was made in some other manner. I find it much more likely that McDermott either forgot that he had made the call to Spartichino, or (more likely) that he was sufficiently embarrassed by his past professional affiliation with Nagle, the latter's later inglorious career, and the unfavorable publicity given Nagle and his role in the Rodwell case (including, in the "Snitch" article, the McDermott connection), that he would not admit to having played a role in it.

192. I find, therefore, that there is no good reason to discredit Nagle's testimony to the Rodwell jury that he called McDermott, who put him in touch with Spartichino, whose first communication with Nagle was on a visit to Billerica on July 7, 1981.

I. The Missing Trial File.

193. Like other attorneys, prosecutors generate and maintain files in the cases they handle. At the time of the Rodwell trial, the Middlesex District Attorney's office had a printed form for the "trial file" (or "CTU file," see McEvoy, pp. 55-57) jacket, and a protocol for what was to be included in the file and in what form.

194. Recollections differ, however, as to what was expected to be in the file in the early 1980s. Judge Whitehead recalled that a "running sheet ... of the events that had taken place in the case" in court – but not out-of-court events – was kept on the jacket in space printed as a form for that purpose, similar to what Middlesex ADAs do today but less thorough. Inside the file, Whitehead would keep police reports and his own "fairly extensive" trial notes and notes of witness interviews, as well as exculpatory material and the fact that it had been disclosed to the defense. (Whitehead, pp. 148-49, 162, 172-73)

195. David Siegel's recollection, however, was that he did not save his notes, but destroyed them after the trial was over. (Siegel, pp. 35-40).

196. Michael Chinman, an appellate attorney with the office beginning in 1992, recalled that by that time at least, the trial files he reviewed generally had copies of all pleadings and often, other materials including the prosecutor's notes, police reports, and sometimes photographs. (Chinman, p. 125-27)

197. Appellate attorneys from the Middlesex DA's office differed on their practices concerning the use of trial files on appeal. Chinman testified that the trial file can be useful on appeal and that appellate attorneys in the office ought to, and generally did, request it as part of their preparation. (Chinman, pp. 94, 102, 104-09) Marguerite Grant, on the other hand, testified that although review of the trial file sometimes necessary (as where there is a Brady

issue), it often is not, and can actually be a hindrance at oral argument where the advocate is to stay carefully within the appellate record. (Grant, pp. 15-17, 21, 24)

198. The Middlesex District Attorney's trial file in the Rodwell case cannot be located.

199. A search by the Middlesex DA's office indicated that the Rodwell trial file was requested in March, 1993 by the ADA who was handling the Third Motion for New Trial (James Takacs, since deceased). (Sarsfield, pp. 143-46) Whether or not the file was retrieved on that occasion is unknown. It is all but certain, however, that the file had disappeared by the time of the Fourth Motion, in 1997. (Grant, pp. 44-49, 52, 56; Sahakian, pp. 13-24)

200. Alumni of the Middlesex DA's appellate division suspect that the original trial file was sent to the Attorney General's office in connection with the federal habeas corpus litigation in 1987, and was lost or destroyed there, and, in any event, never made its way back to the District Attorney's office.[69] (Grant, pp, 44-50; Sahakian, pp. 13-24; but see Hunt, pp. 44-55)

201. On this evidence, the theory of loss or destruction by the Attorney General's office has neither been proved nor disproved. In a perfect world, the District Attorney would have kept better and more permanent track of where its files were and, if they were outside the DA's custody, when they were due back (e.g., when a habeas corpus petition had been finally adjudicated); and would have ensured their prompt return.

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[69]Because the defendant(s) in a habeas corpus petition are usually employees of the Department of Correction, the AGO is responsible for defending the original conviction. The loss-or-destruction theory was attributed to Pamela Hunt, the Appeals chief in the Harshbarger administration, who was attributed with saying that files from the predecessor (Shannon) administration could not be found. Hunt herself remembered no such thing. (Hunt, pp. 44-60).

202. It doesn't matter which agency is responsible for the unavailability of the Rodwell trial file. A District Attorney's file is required to be kept for 50 years after disposition or last entry. Massachusetts Statewide Records Retention Schedule 02-11 as amended August 2012, p. 85 (Ex. 152; available at http://www.sec.state.ma.us/arc/arcpdf/0211.pdf). The Rodwell file was plainly lost or destroyed by an agency of the Commonwealth; how, and by whom, has not been proved.

203. The Commonwealth is responsible for the unavailability of the Rodwell trial file. Rodwell has not, however, proved that the Commonwealth's conduct was intentional, reckless, or in bad faith.

204. Nor has Rodwell proved that the trial file, if it could be located, would have yielded exculpatory evidence, especially concerning the issue before me. Spartichino was, by all accounts, a capable and intelligent detective who would undoubtedly have known of the Massiah rule. Suppose there were evidence that he was corrupt as well, willing to do anything for a conviction (presumably, one that would withstand appeal). If Nagle had been recruited (or had come forward) before or during the period during which Rodwell was speaking with him, it is highly unlikely that this information would be reported to the ADA handling the case; and even supposing that *he* was corrupt as well, it is at least as unlikely that he, also desirous of an appeal-resistant conviction, would have documented Nagle's status as government agent in the trial file.[70]

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[70]Nor is it at all likely that the entire trial file would have been destroyed in order to conceal notes or correspondence concerning this issue.

J. Ultimate Findings of Fact.

205. James Rodwell was convicted of the murder of Louis Rose based on the testimony of Francis Holmes, with corroboration principally from the testimony of David Nagle. Without Nagle's testimony, Rodwell's chance of an acquittal would have been materially greater.

206. Nagle arrived at the Billerica jail on April 22, 1981, where he was held on robbery charges in Suffolk and Middlesex County. He first met Rodwell between May 22 and May 24, 1981.

207. Nagle's last contact with Rodwell was at the end of June. He then called William McDermott, asking to be put in touch with the officer in charge of the Rose murder investigation.

208. Lt. Spartichino visited Nagle in Billerica on July 9 or 10, 1981, and took an unrecorded statement. Having arranged Nagle's transport to the Greenfield jail, Spartichino drove out there on August 6, 1981 with a stenographer, and obtained from Nagle a stenographically recorded statement.

209. In exchange, Spartichino had only promised to speak, and to write a letter, on Nagle's behalf. The promises, rewards or inducements offered Nagle in connection with the Rodwell case were accurately disclosed to trial counsel.

210. Although Lt. Spartichino kept his promise to Nagle with unusual vigor, and contributed materially to the very lenient sentences that Nagle received in his 1980-81 cases, he had not promised anything other than to write and speak on Nagle's behalf in sentencing hearings on his then pending cases.

211. Although Nagle had been a paid informant for the Drug Enforcement Agency, [REDACTED] there was no agreement, actual or promised, between Nagle and the DEA at the time he and Rodwell were housed in Billerica.

212. Nagle and the DEA never had an articulated agreement containing a specific benefit or promise thereof in exchange for information about Rodwell or the Rose murder.

213. [REDACTED]

214. The loss of the District Attorney's trial file, sometime in the 1980s or 1990s, was unfortunate but, so far as the evidence shows, was the result of negligence, not recklessness or bad faith. It is also highly unlikely that the file, if found and intact, would contain evidence proving or suggesting that David Nagle acted as a government agent in speaking with Rodwell.

IV. CONCLUSIONS OF LAW

A. Spoliation.

The SJC has summarized the law governing spoliation of evidence by the prosecution in a criminal case as follows. Generally speaking,

> "[a] defendant who seeks relief from the loss or destruction of potentially exculpatory evidence has the initial burden, ... to establish a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the [lost or destroyed evidence] would have produced evidence favorable to his cause .... If he meets his initial burden, a balancing test is employed to determine the appropriateness and extent of remedial action. The courts must weigh the culpability of the Commonwealth, the materiality of the evidence, and the potential prejudice to the defendant."

Commonwealth v. Williams, 455 Mass. 706, 716–717 (2010), quoting from Commonwealth v. Cintron, 438 Mass. 779, 784 (2003); see Commonwealth v. Sanford, 460 Mass. 441, 447 (2011).

"If a defendant is unable to meet this threshold burden," however,

> he "may be independently entitled to a remedy" of exclusion if the loss or destruction of evidence was due to the bad faith or reckless acts of the Commonwealth. In such a case, the judge may infer properly the exculpatory nature of the destroyed evidence, in essence shifting to the Commonwealth the burden to show that the lost or destroyed evidence was not exculpatory.

Stanford at 447, quoting from Williams at 718.

The evidence in this case shows neither a reasonable possibility that the Rodwell trial file, if properly preserved and produced, would have contained exculpatory evidence on the issue of Nagle's status, nor a probability that its loss was the result of recklessness or bad faith. No sanctions for spoliation, therefore, are in order.

B. Government Agent.

In Massiah v. United States, 377 U.S. 201, 206 (1964) and a line of cases proceeding from it, the Supreme Court has held that once a defendant has been arraigned and the right to counsel has attached, the government may not "deliberately elicit[]" statements from a defendant without counsel present or consenting. Accord, Michigan v. Jackson, 475 U.S. 625 (1986); Maine v. Moulton, 474 U.S. 159 (1985); United States v. Henry, 447 U.S. 264 (1980). For Massiah to apply, there must be "an 'articulated agreement containing a specific benefit,' or promise thereof." Commonwealth v. Murphy, 448 Mass. 452, 453 (2007).

To quote the SJC's more recent and comprehensive summary of the Massiah principle:

> This rule applies not only to overt interrogation by government officers, but also to "indirect and surreptitious" interrogation by persons acting as government agents. Indirect interrogation need not involve actual questioning, but it does require "some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks."
>
> Whether someone is an agent of the government for purposes of the Sixth Amendment and art. 12 depends on the circumstances of each case. One who is paid by the government for incriminating evidence and who "deliberately elicit[s]" statements from a defendant acts as an agent of the government. One who receives a promise of the recognition of cooperation and thereafter "deliberately elicits" incriminating evidence from a defendant acts as an agent of the government. Benefits promised to someone pursuant to a cooperation agreement need not be conferred directly by the prosecuting authority, and may include arrangement of benefits through a different prosecuting authority. An agency relationship may arise other than by express agreement, and may "evolve[ ] by implication from the conduct of the parties." However, someone "who has not entered into any agreement with the government, and who reports incriminating evidence to police out of conscience or even 'an unencouraged hope to curry favor' is not acting as a government agent." "An individual's actions will not be attributed to the State if no promises are made for that

> individual's help *and* if nothing was offered to or asked of that individual."

Commonwealth v. Foxworth, 473 Mass. 149, 157-58 (2015) (citations omitted; emphasis supplied in Foxworth decision).

In this case Nagle was not paid or offered money in exchange for his testimony in the Rodwell trial. Lt. Spartichino certainly promised him "recognition of cooperation" – that he would make Nagle's assistance known, presumably to the prosecutors and judges handling his Suffolk and Middlesex cases, which Nagle anticipated would result in a lesser sentence – but this was only after his last conversation with Rodwell. That Nagle may have anticipated this even while he and Rodwell were blockmates is beside the point: he was not, while he and Rodwell were together, an agent of the Middlesex District Attorney.

What, then, of Nagle's past relationships with the DEA **[REDACTED]** ? As the Foxworth decision is careful to note, an informant qualify as a government agent even though he has an agreement with a different law enforcement authority than the one which is to confer the expected benefits. 473 Mass. at 157-58.

In fact, Commonwealth v. Murphy was just such a case. The informant had a federal case in which he entered into a plea agreement under which, if he "provided 'substantial assistance' to the government," the U.S. Attorney's Office "in its discretion" could file a motion requesting that the sentencing judge impose a sentence below that which the Sentencing Guidelines would otherwise require. After he procured statements from Murphy, the District Attorney's office reported the informant's cooperation to the United States Attorney, which filed a motion to reduce his sentence by fifty percent. This, under Massachusetts constitutional law at least, constituted the requisite "articulated agreement," even though the unsuspecting confidant was not targeted by the

agreement (an issue on which the federal circuits are split), and notwithstanding that the informant assisted one agency and was rewarded by another. 448 Mass. at 457-68.

Neither principle is of assistance in this case, however. [REDACTED] Nor is there evidence that Nagle and Oteri were still in touch in May-June of 1981, or that Oteri had a substantial role or interest in the Rose murder investigation, or even that Nagle had any reason to believe that Oteri might be interested in Rodwell's admissions. There is affirmative evidence to the contrary: when it came time to make his move, Nagle called McDermott, who called called Spartichino. There is thus no evidence of an agency agreement "by implication" between Nagle and the Somerville Police.

The same is true of the DEA. Before he met Rodwell, Nagle's relationship with the DEA was at an end, at least for the time being. He would have no reason to believe the DEA would take an interest in the Rodwell case or that it might reward him for his service to the DEA, and he did not seek to obtain any consideration from the DEA for it, before, during or after the period that he and Rodwell were housed together.

Finally, there is no evidence that Nagle took steps to elicit inculpatory statements from Rodwell; that he engaged in "some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks." Foxworth, 473 Mass. at 157, quoting Murphy, 448 Mass. at 263 and Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986). The only evidence on this point – Nagle's trial testimony – is that it was Rodwell who brought up the subject. (TTr. v. 4 p. 120) In short: there is no credible evidence that Nagle, when he and Rodwell were in proximity to one another, was a government agent.

C. *Brady v. Maryland.*

In Brady v. Maryland, 373 U.S. 83 (1963), the U.S. Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Simply put, the Commonwealth's obligation was to produce such evidence as "creates a reasonable doubt that did not otherwise exist." Commonwealth v. Jackson, 388 Mass. 98, 110 (1983), quoting from United States v. Agurs, 427 U.S. 97, 112 (1976); see Commonwealth v. Clemente, 452 Mass. 295, 311, 893 N.E.2d 19 (2008) ("Due process requires that 'the government disclose to a criminal defendant favorable evidence in its possession that could materially aid the defense against the pending charges'); citation omitted).

> This duty of disclosure extends, however, only to "information in the possession of the prosecutor and information in the possession of persons 'sufficiently subject to the prosecutor's control.'" Those subject to the prosecutor's control and whose work product is included within the prosecutor's duty of disclosure are those persons acting, in some capacity, as agents of the government in the investigation and prosecution of the case.

Clemente at 311; see Commonwealth v. St. Germain, 381 Mass. 256, 261 n.8 (1980) (obligation extends to "'members of [the prosecutor's] staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office'"), quoting A.B.A. Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 2.1(d) (Approved Draft 1970).

As in Clemente, there is no evidence that the DEA, or its agents who knew of Nagle's past agreement with and services to that agency, stood in an agent-principal relationship with the prosecuting authority in the Rodwell case. 452 Mass. at 311. And while Detective Oteri put in

cameo appearances at the beginning and the end of the investigation of the Rose murder, there is no evidence that he was subject to the control of the DA's office in this case, then or ever. [REDACTED]

Finally, this issue was substantially presented, considered and settled in the Second and Fourth Motions for New Trial. The Second Motion "[sought] to raise again the defendant's contention about Nagle's status as a government agent," this time with proof of his DEA affiliation. The materials presented, which included the Moran affidavit, Nagle's vistor's list in the Dedham jail, and excerpts from the Quinlivan transcript were, in Judge Dimond's estimation,

> only cumulative of evidence previously considered at the pretrial hearing and on the defendant's first motion for new trial. And ... nothing in the allegedly new evidence related to the incarceration of Nagle and the defendant in the Billerica House of Correction, where the defendant's incriminating statements were made. I conclude that the present materials lack materiality, weight, and significance.

(Ex. 10, p. 185) A single justice evidently agreed, and denied Rodwell's application to appeal. No Brady argument was made in the Second Motion, Nagle's affiliation with the DEA was out in the open. The problem, then and now, is a lack of evidence that this information was known to the DA's office or anyone answerable to it, prior to trial.

The focus of the Fourth Motion, by contrast, was primarily on Brady, and the prosecution's supposed failure to disclose in adequate detail Nagle's criminal record, his history as a government informant to the DEA and various police departments (including Atty. Juliar's statement at Nagle's June 12, 1981 bail hearing that he had given "a great deal of information" to authorities in Suffolk and Middlesex counties), and the promises, rewards and inducements offered him.

A Superior Court judge gave the argument short shrift; Justice Marshall, more consideration; but the conclusion was the same: the Brady argument was cumulative of the "government agent"

argument "raised by Rodwell in various forms before several judges, beginning at his original trial," and which "[did] not present substantial questions that have not been considered by this Court." Ex. 13, pp. 318-19. To whatever extent (if any) the Brady issue is still subject to revisitation, no violation has been proved.

ORDER

Following an evidentiary hearing and for the reasons given above, the defendant's seventh (August 19, 2013) Motion for New Trial is DENIED.

Thomas P. Billings
Justice of the Superior Court

Dated: May 20, 2016

APPENDIX A: HEARING WITNESSES

Volume	Date	Witness
1.	9/18/15	William G. Chase
		Scott Sarsfield
2.	9/25/15	William McDermott
		Thomas Macone
		William Powers
3.	10/9/15	Andrew Silverman
		Diane Juliar
4.	10/26/15	Donald Cuccinelli
		Martin Rosenthal
		Benjamin Keehn
5.	11/12/15	Hon. Howard Whitehead (Ret.)
6.	12/21/15	Robert Nelson
7.	12/22/15	David Siegel
8.	1/19/16	Michael McHugh
		Brendan Weir
		Hon. Paul Buckley (Ret.)
9.	1/20/16	William Flynn
		Michael Chinman
		Mary Jane Walsh
10.	1/21/16	Marie Leary
		John McEvoy
11.	1/22/16	Marguerite Grant
		John O'Connor
12.	2/9/16	Nancy McCann
13.	2/16/16	Thomas Macone (recalled)
	2/16/16	James Donovan
14.	2/18/16	Paul Trant
15.	2/26/16	James Sahakian
16.	2/29/16	Hon. Brian Gilligan
	2/29/16	Pamela Hunt, Esq.

APPENDIX B: EXHIBITS

Ex. #	Page	Title	Status
	N/A	Trial transcripts – Commonwealth v. Rodwell	Admitted
1	1	Rodwell pretrial motion for discovery	Part of Court file
2	9	Pretrial hearing	Part of Court file
3	73	First Motion for New Trial	Part of Court file
4	120	Motion for discovery – first motion for new trial	Part of Court file
5	123	Affidavit of Thomas Spartichino	Admitted
6	130	Denial of first motion for new trial	Part of Court file
7	141	Second motion for new trial	Part of Court file
8	166	Affidavit of Thomas Moran	Part of Court file
9	170	Motion for discovery – second motion for new trial	Part of Court file
10	179	Denial of second motion for new trial	Part of Court file
11	187	Motion to expand the record	Part of Court file
12	189	Third motion for new trial	Part of Court file
13	269	Fourth motion for new trial	Part of Court file
14	489	Denial of fourth motion for new trial, and appeal	Part of Court file
15	502	Fifth motion for new trial	Part of Court file
16	539	Denial of fifth motion for new trial, and appeal	Part of Court file
17	560	Motion to intervene, 2004	Part of Court file
18	564	Motion to intervene and terminate attorney-client privilege, 2005	Part of Court file
19	572	Denial of motion to intervene and terminate attorney-client privilege, 2005	Part of Court file
20	574	Sixth motion for new trial	Part of Court file
21	584	Denial of sixth motion for new trial	Part of Court file
22	588	Dwyer motion for records	Part of Court file
23	600	Opposition to Dwyer motion for records	Part of Court file

24	725	Motion to furnish transcripts	Part of Court file
25	758	David Nagle Guilty Plea, Suffolk Nos. 035529-32	Admitted
26	745	Opposition to motion to furnish transcripts	Excluded
27	756	Motion to complete the record	Excluded
28	762	Denial of motion to complete the record	Excluded
29	764	David Nagle bail hearing, Middlesex Nos. 80-3006-07	Admitted
30	772	David Nagle Docket, Suffolk No. 035529-32	Admitted
31	775	David Nagle Guilty Plea: Suffolk Docket Nos. 054341-47, 054363-67	Admitted
32	804	David Nagle Guilty Plea: Middlesex Docket Nos. 852548-52, 861378-79	Admitted
33	821	David Nagle Motion to Reconsider: Middlesex Docket Nos. 852548-52, 861378-79	Excluded
34	823	Allowed Motion to Unseal Transcript: Suffolk Docket Nos. 054341-47, 054363-67	Excluded
35	861	Opposition to Nagle Motion to Reconsider: Middlesex Docket Nos. 852548-52, 861378-79	Excluded
36	871	David Nagle FBI Criminal Justice Information System Record	Admitted
37	875	Death Certificate: Louis Rose Jr.	Admitted
38	877	Police Report: Hamilton 12/3/78	Admitted
39	879	Police Report: Spartichino 3/25/79	Admitted
40	886	Police Report: Ballistics 1/22/79	Admitted
41	889	Freedom of Information Act Request for Nagle's DEA Informant Records and DEA Response	Excluded
42	899	Police Report: Callinan 12/3/78	Admitted
43	901	Pretrial Conference Report	Excluded
44	904	James Rodwell Docket	Part of Court file
45	938	Affidavit of Attorney Kevin Reddington from Sixth Motion for New Trial	Excluded

46	942	David Nagle Writ of Habeas (Summons): Middlesex Docket Nos. 80-3006-7	Admitted
47	944	Letter from National Archives	Excluded
48	946	Opposition to First Motion for New Trial	Part of Court file
49	983	David Nagle Criminal Record	Admitted
50	993	Francis Holmes Criminal Record	Admitted
51	998	Opposition to Fourth Motion for New Trial and Appeal	Part of Court file
52	1010	Attorney Kevin Reddington: Attempts to Contact Nagle	Admitted
53	1028	Attorney Tim Bradl: Attempts to Contact Nagle	Admitted
54	1033	Opposition to Motion to Suppress Nagle's Statements	Part of Court file
55	1043	James Rodwell: Attempts to Contact Nagle	Admitted
56	1049	Affidavit of Attorney Kevin Reddington from Motion to Unseal	Excluded
57	1057	Affidavit of Michael Brooks	Part of Court file
58	1060	Police Report: O'Donnell 12/3/78	Admitted
59	1062	Police Report: Shine 12/3/78	Admitted
60	1065	Affidavit of Joseph Bargmann	Part of Court file
61	1070	Francis Holmes Massachusetts State Police Interview	Admitted
62	1123	Affidavit of Thomas Farina	Part of Court file
63	1129	Affidavit of Ty West	Part of Court file
64	1131	David Nagle Signed Waiver of Attorney Client Privilege	Admitted
65	1135	Allowed Motion to Modify Impoundment	Excluded
66	1145	David Nagle Massachusetts State Police Interview	Admitted
67	1191	Francis Holmes Immunity Order	Part of Court file
68	1194	Pretrial Motion to Suppress Nagle's Statements	Admitted

69	1200	David Nagle Docket: Middlesex Docket Nos. 80-3006-7	Admitted
70	1204	Rental Car Records	Excluded
71	1207	Trial Crime Scene Photos	Excluded
72	1209	Crime Scene Photos Received After Trial	Excluded
73	1211	James Rodwell Property Intake Form	Admitted
74 74A	1213	David Nagle Military Records	Admitted
75	1218	David Nagle Indictment: Middlesex Docket No. 82-1058	Admitted
76	1222	Newspaper Article re: Speeding Ticket	Admitted
77	1224	David Nagle Pretrial Conference Report: Suffolk Docket Nos. 035529-32	Admitted
78	1228	Opposition to Sixth Motion for New Trial	Part of Court file
79	1304	Affidavit of Suffolk A.D.A. Robert Nelson	Part of Court file
80	1307	Opposition to Motion for Post Conviction Discovery	Part of Court file
81	1319	Transcript: U.S. v. Murphy, Deyo, and Quinlivan, Docket No. 84-103-F	Admitted
82	1704	Commonwealth's Proposed Findings of Fact for First Motion for New Trial	Part of Court file
83	1713	Affidavit of Investigator Kevin Flynn re: Francis Holmes Interview	Part of Court file
84	1715	Denial of Appeal: Comm. v. Rodwell, 394 Mass. 694, 698-99 (1985)	Part of Court file
85	1723	Opposition to Second Motion for New Trial	Part of Court file
86	1749	David Nagle Case File: Middlesex Docket Nos. 80-3006-7, 82-1058	Admitted
87	1776	Opposition to Fifth Motion for New Trial	Part of Court file
88	1828	David Nagle 2006 Letter to Middlesex District Attorney	Admitted
89	1833	Affidavit of David Mason re: Charles Ryan	Part of Court file

90	1836	Denial of Third Motion for New Trial	Part of Court file
91	1845	Affidavit of Jodi Marino	Part of Court file
92	1847	Affidavit of Carolyn Rodwell	Part of Court file
93	1849	Affidavit of Patricia Herda	Part of Court file
94	1851	James Rodwell Hospital Records	Part of Court file
95	1861	Forbes Investigation Report	Part of Court file
96	1873	Commonwealth's Pretrial Discovery Provisions	Part of Court file
97	1880	Transcript: U.S. v. Mourad, *et al.*, Docket No. SDNY 82-CR-00769	Admitted
98 98A	2306	Transcript and recording: Interview of David Nagle at Bridgewater State Hospital 5/25/12	Admitted
99	2422	Affidavit of William McDermott	Part of Court file
100	2425	David Nagle 1991 Letter to Judge Catherine White	Admitted
101	2430	Rodwell v. Fair, 834 F.2d 240, slip-op (1st Cir. 1987)	Judicial Notice
102	2441	Rodwell v. Pepe, 183 F.Supp.2d 129 (D.Mass.2001)	Judicial Notice
103	2447	Commonwealth v. Rodwell, 432 Mass. 1016 (2000)	Judicial Notice
104	2451	Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003)	Judicial Notice
105	2458	Forewoman Documents- Mary Chubbs	Part of Court file
106	2461	Affidavit of William Chase	Part of Court file
107	2465	Magazine Article Snitch- John Strahinich	Admitted
108	2479	David Nagle Brighton District Dockets 1706-09, 2051-54	Admitted
109	2484	David Nagle Appearance: Brighton District April 22, 1981	Admitted
110	2487	David Nagle Indictments: Suffolk Docket Nos. 035529-32	Admitted
111	2496	U.S. v. Mourad, *et al* docket	Excluded

112	2509	David Nagle Docket SUCR1982-35529, 1982-present	Admitted
113	2513	David Nagle Docket SUCR1985-54341, 1985-present	Admitted
114	2518	Affidavit of Diane Juliar	
115	2524	Diane Juliar Running Sheets	Admitted
116	2539	Juliar Request for Nagle's Criminal Record	Excluded
117	2542	Spartichino Letter to ADA Nelson	Admitted
118	2544	May 5, 1981 Letter from Nagle to Diane Juliar	Admitted
119	2545	Juliar File- David Nagle 80-3006, 3007 Indictments	Excluded
120	2549	Affidavit of Martin Rosenthal	Part of Court file
121	2556	Martin Rosenthal Running Sheets	Admitted
122	2576	Rosenthal File- David Nagle Brighton District Indictments	Excluded
123	2580	Rosenthal File- David Nagle Suffolk Superior Indictments	Excluded
124	2596	Rosenthal July 24, 1981 letter to ADA Howard Whitehead	Admitted
125	2597	Rosenthal June 19, 1981 Memorandum to Suffolk Superior 1st Session Duty Attorney	Admitted
126	2598	Rosenthal Request for Nagle's Criminal Record	Admitted
127	2604	Rosenthal's Copy of Nagle's Probation Office Court Record	Admitted
128	2612	Spartichino Letter to ADA Nelson	Duplicate – Ex. 117
129	2614	Affidavit of Andrew Silverman	Part of Court file
130	2919	Andrew Silverman Running Sheets	Admitted
131	2653	David Nagle Death Certificate	Admitted
132	2654	Affidavit of Kevin Flynn	Part of Court file
133	2660	David Nagle 2013 Board of Probation Record	Admitted
134	2669	Certified Copy of Middlesex Docket No. 82-1058	Admitted

135	2671	Affidavit of William Cintolo	Part of Court file
136	N/A	Transcript of 1985 bench conference (filed with Ex. 31)	Admitted
137	2671	Commonwealth's notice of discovery re trial file	Part of Court file
138	2681	Affidavit of Howard Whitehead	Excluded
139	2685	David Nagle Newton armed robbery police report	Admitted
140	2687	David Nagle statement to Boston police	Admitted
141	2726	James Rodwell property envelope Somerville Police	Admitted
142	2728	Handwritten report by or for Sgt. Oteri	Admitted
143	2732	Letter from Attorney Steven Rappaport to Attorney Rosenthal	Admitted
144	2735	Response from Attorney Rosenthal to Attorney Rappaport	Admitted
145	2737	Transcript of September 9, 2014 hearing	Admitted
146	2787	Certified copy of Newton District Court Docket Case no. 81-564	Admitted
147	N/A	N/A	N/A
148	N/A	N/A	N/A
149	N/A	N/A	N/A
150	N/A	Sarsfield subpoena	Admitted
151	N/A	Rodwell Tr. from 9/30/93	Admitted
152	N/A	Statewide retention policy excerpt	Admitted
153	N/A	Retirement papers Macone	Admitted
154	N/A	Various awards and medals received by Officer Macone	Admitted
155	N/A	Various awards and medals received by Officer Macone	Admitted
156	N/A	Various awards and medals received by Officer Macone	Admitted

157	N/A	Various awards and medals received by Officer Macone	Admitted
158	N/A	Various awards and medals received by Officer Macone	Admitted
159	N/A	Various awards and medals received by Officer Macone	Admitted
160	N/A	Various awards and medals received by Officer Macone	Admitted
161	N/A	Mug shots - David Nagle	Admitted
162A 162B	N/A	DEA file – David Nagle	Admitted
163	N/A	Benjamin Keehn running sheets	Admitted
164	N/A	Police Officer's Report Supplement – Homicide	Admitted
165	N/A	Police Officer's Report Supplement – Autopsy	Admitted
166	N/A	Somerville Police Department Station Report	Admitted
167	N/A	Somerville Police Department Report	Excluded
168	N/A	Somerville Police Department Report	Excluded
169	N/A	Somerville Police Department Report	Excluded
170	N/A	Somerville Police Department Report	Excluded
171	N/A	Transcript, hearing on Third Motion for New Trial before Sosman, J. 9/30/93 (formerly marked as Exhibit A on 1/20/16; admitted 1/21/16)	Admitted
172	N/A	Docket SJC appeal from denial of Third Motion for New Trial (formerly marked as Exhibit B on 1/20/16; admitted 1/21/16)	Admitted
173	N/A	N/A	N/A
174	N/A	N/A	N/A
175	N/A	Letter, Marguerite Grant to Judge Barrett 8/5/98	Admitted
176	N/A	Letter, Stephanie Glennon to Judge Barrett 7/29/98	Admitted
177	N/A	C.V., Nancy McCann	Admitted
178	N/A	Notes of Detective Philip Oteri	Admitted

179	N/A	Spartichino, Record of Investigation 5/22/81	Admitted
180	N/A	Spartichino, memo to Lt. Col. O'Donovan 10/22/81	Admitted
181	N/A	Somerville P.D., page from Journal, 12/4/78	Admitted

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2016-0237

MIDDLESEX SUPERIOR COURT
No. 1981-CR-1712/14

COMMONWEALTH

vs.

JAMES RODWELL

ORDER DENYING MOTION FOR RECONSIDERATION

This matter is before me on the defendant's motion for reconsideration of the denial of his G.L. c. 278, § 33E gatekeeper application seeking leave to appeal the denial of his seventh motion for new trial. Here, defense counsel and the Commonwealth have skillfully argued and thoughtfully presented their case before me. After carefully considering the relevant filings, including the defendant's motion for reconsideration and supplemental filings; the August 17, 2017 memorandum of decision of this Court, Hines, J., presiding, denying the defendant's gatekeeper application; the defendant's July 5, 2016 legal memorandum in support of his gatekeeper application; the 115 page memorandum of factual findings issued by the motion judge on May 20, 2016, following a sixteen-day evidentiary hearing which included the testimony of twenty-nine witnesses; and the Commonwealth's numerous oppositions; I conclude that there was no error in the single justice's denial of the

defendant's gatekeeper application. Justice Hines correctly determined that "although the defendant presented some new evidence, none of the issues raised present a new and substantial question as required by G. L. c. 278, § 33E" (internal quotations omitted). Accordingly, the motion for reconsideration be, and hereby is, DENIED.

Scott L. Kafker
Associate Justice

Dated: July 23, 2018

Additional material from this filing is available in the Clerk's Office.