

COMMONWEALTH OF MASSACHUSETTS

Middlesex ss

Commonwealth

Framingham District Court

Six Man Jury Session  
Criminal Docket

00-3006

v.

Michael Elbery

Combined

Defendant's Motion For Continuance

Inquiry as to Trial Date

1. The defendant, pro se, motions the Court for a continuance of the allegedly scheduled 5-17-01 trial of the above docketed case. As reasons for the continuance the defendant says, .

Untimely Notice of Trial for an Incarcerated Defendant

2. The defendant was informed on 5-3-01 by a transport cop in the holding tank of the Framingham District Court that trial was set on the above docketed case for 5-17-01.

Summons - Witness Testimony

3. The defendant needs 17 witnesses for his defense that will all donate exculpatory evidence for the defense. This incarcerated defendant needs each of theses 17 witnesses to be served with a court issued summons and required fees by a sheriff.

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4. This defendant needs those 17 witnesses and related evidence they will provide in order to present a complete defense and have a fair trial.

5. It is impossible for this incarcerated pro se defendant to serve the defense witnesses, as above, in time for trial.

6. This defendant has already motioned the Court twice to serve this defendant's summons in order to have Compulsory Process. See docket entries of this case for those motions.

Discovery Not Provided Under "Brady" - Prosecution Violates Court Order

7. On 3-8-01 the Court ordered the prosecutor to produce 2 pieces of evidence that they undisputably have.

a. The victim's, Peter H. Gear's, medical reports resulting from the alleged assault.

b. The 7-4-00 F.P.D. Booking Photo of the arrest of Peter H. Gear , and related FPD Booking Report of the 7-4-00 Gear arrest.

8. This pro se defendant did receive on 5-12-01 Gear's Booking photo but not the related report that reveals exculpatory evidence per my investigating attorney, Ken Brekka.

9. At this late date 5-14-01 this defendant has not received Gear's Emergency Room Records of 7-4-00 as he told Dr. Martin, as documented by Dr. Martin on her medical report concerning her observations and treatment to Gear concerning his alleged injuries.

10. Gear and the Prosecution have not provided Medical records<sup>y</sup> of Gear's extensive past medical history for numerous diseases that Dr. Martin mentions in her report.

11. The prosecution has not provided this defendant certified copies, on 5-3-01, of Gear's medical records, so there is no way to tell if there are missing records that could be further exculpatory. This pro se defendant only received those medical records on 5-3-1.

Discovery - Other - 36 "Brady" Requests -  $1\frac{1}{2}$  have been provided

12. This pro se defendant made 36 "Brady" discovery requests. At this late date he has been provided with some medical evidence and  $\frac{1}{2}$  a Police booking report of 7-4-00, this as above.

13. As a result of the above illegallities this pro se defendant cannot receive a fair trial this is a violation of the 14th and 6th Amendment of the U.S. Constitution.

What is the Trial Date?

14. The defendant, pro se asks the Court to notify him of the official trial date of this case. Notification by a transport cop is worthless.

Wherefore,

The incarcerated prose defendant asks this court to Continue the trial of the above docketed action so he can be prepared for trial and present a complete defense via required summons to witnesses and mandatory discovery per Federal "Brady laws", as above.



SEE ATTACHED AFFIDAVITS IN SUPPORT

SEE ATTACHED MEMORANDUM OF EAW

Michael Elbery, C57634  
Secc , 12 Administration Rd.  
Bridgewater, Mass. 02324  
5-12-01

commonwealth of massachusetts

Middlesex ss

F.D.C.

Commonwelth of Mass.

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#00-3006

Michael Elbery

Memorandum in Support of Defendant's

Motion for Continuance

Per Mass. Practice, Vol. 30, p. 619, s. 1107, the discretion of the Judge in granting a continuance is subject to the Constitutional Right to Due Process of Law.

Limits on a Judge's discretion to grant continuances are imposed by the defendant's Constitutional Right to the testimony of witnesses in his behalf. Ungar v. Sarafite, 376 U.S. 575, 84 S. Ct. 841, 11 L.Ed.2 921 ('64): U.S. v. Coreia , 531 F2d 1095 (1st Cir. '76)

A continuance must be granted when the defendant will suffer a "Miscarriage of Justice" and a violation of the Sixth ( Compulsory Process) and Fourteenth Amendments ( Due Process of Law) because the defendants witnesses will not be present for trial, especially when it was no fault of the defendant.

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#00-3006

Affidavits

In Support of Defendant's Motion for Continuance

1. I am the defendant, Michael Elbery, I am incarcerated at SECC Prison.

2. I was informed by a transport cop on 5-3-01, while in the Framingham District Courtholding tank, of the trial date of this case being 5-17-01. I was never notified by the court of the trial date in writing or vocally.

3. I need all of the 17 witnesses I have already submitted to the Court via my Ex-Parte Motion for Court to serve my witness summons.

7-4-00 F.P.D. Gear arrest Booking Report

4. The prosecution, although ordered by the Court, has not produced the Booking Report of the arrest of Peter H. Gear on 7-4-00 by the F.P.D.

5. This defendant only received the "Booking Photo" (Mug Shot) of

Gear's F.P.D. 7-4-00 arrest on 5-12-01, hardly timely for a 5-17-01 trial.

Witness Summons for Trial Testimony

6. It is impossible for this incarcerated defednat to serve through a a sheriff summons ~~which~~ required witness fees from inside this prison. The treasurer's office is in a remote location and the process, if poss<sup>ible</sup>, would take weeks ot accomplish, if at all.

7. I have motioned the Court twice to serve my witnesses ' and issue me Court summons. see docket entries of this case.

Court Ordered Medical Records - Peter H. Gear

8. The Court on 3-801 ordered the prosecutor to produce the alleged victim's medical reports concerning his injuries of this case.

9. This prose defendant received, on 5-3-01, "uncertified" medical copies of Gear's alleged injuries, there is no way to determine if they are ocmlplete.

ER- Records

10. Per Peter H. Gear's doctor, Tamara Martin, her report states Gear admits to going to an emergency room prior to Brigham Hospital on 7-5-00. According to Dr. Martin's report Gear went to an Emergency Room about his alleged injuries which are the prosecution's case in chief, some time ~~af~~ter the incident but prior to seeing Dr. Schissel on 7-5-00.

I do nothave thes~~e~~ Emergency Room records of the instant medical account resulting from Gear's visit to a hospital for medical treatment and observation from the incident at the Mobil on 7-4-00.

11. As also documented by Dr. Martin's reports, Gear has an extensive medical history of diseases. These history of diseases are the cause of Gear's alleged disability according to Dr. Martin and Dr. Docken. The diseases causing Gear's alleged right foot disability are fibromyalgia, hyperlipidemia, and cellulitis.

12. The prosecution is blaming this defendant for Gear's alleged right foot disability not Gear's diseases. as in #11 above.

13. This defendant needs the records of Gear's prior medical history to inform the jury of the cause of Gear's alleged foot disability. Otherwise there is more concealment in this case of exculpatory evidence.

36 Brady discovery requests

14. I have received one "Booking Photo" and Gear's Brigham Woman's Hospital Records, only, -which amounts to about 1½ requests out of 36 "Brady" requests.

The above is true and correct, signed under the pains and penalties of perjury this 15th day of May, 2001.

A handwritten signature in black ink, appearing to read "Mark C. Wey, p-o LQ". The signature is written in a cursive, flowing style.