

Michael Elbery, C57634  
SECC - Prison  
12 Administration Rd.  
Bridgewater, Mass. 02324  
5-29-01

Clerk-Criminal  
Framingham District Court  
600 Concord St.  
Framingham, Mass. 01701

RE: Commonwealth v. Michael Elbery 00-3006

Dear Clerk:

Please find for immediate filing and review,

"Defendant's Motion To Reconsider and Allow Defendant's Motion

for  
Peter H. Gear's Therapist Records"

Affidavits in Support and Certificate of Service

Thank you.

COMMONWEALTH OF MASSACHUSETTS

Middlesex ss

Framingham District Court  
Six Man Jury

Commonwealth

v.

Criminal Docket

Michael Elbery

00-3006

Defendant's Motion To Reconsider and Allow Defendant's Motion

for

Peter H. Gear's Therapist. Records

1. The defendant, Pro se, motions the Court to reconsider and allow the defendant's discovery request 6c of the Defendant's "Mption to Compel Prosector to Produce Discovery Evidence" for the "therapist" records of Peter H. Gear. See Ex. A.
  2. Peter H. Gear, alleged victim, of the above docketed case has made claim that he has been seeing a therapist for mental trauma as a result of the alleged "beating" he received that caused this case.
  3. At the 5-17-01 "Surprise Discovery Motion Hearing" Special A.D.A. Ford admitted Gear went to a therapist and claimed it was due to the alleged "beating" Gear experienced causing this instant action.
- LAW
4. Per Special A.D.A. Ford at the 5-17-01 hearing and as above the evidence is Gear did not go to a Psychotherapist, as a result there is no privileged communication involved. Mass. G.L. C. 233 s. 20B.

5. Per Liacos, Handbook of Massachusetts Evidence, 7th Ed. s. 13.5.2, , Mass. c. 233 S. 20B a psychotherapist is a person licensed to practice medicine, who devoted a substantial portion of his time to the practice of psychiatry.

6. Gear's therapist records are relevant as above he went to the therapist because of his alleged "beating" that caused this action.

7. Gear and the prosecution are once again concealing exculpatory evidence from the defendant. As a result of recent discovery evidence, finally allowed to this defendant after 10 months of demand, it is documented Gear and the prosecutor have fabricated the most inculpatory prosecution evidence of the case. Gear is committing fraud in order to acquire a pension from Mobil Corp. and to Frame this defendant.

Bishop-Fuller - "psychoanalyst communications"

8. If the prosecutor makes claim that Gear's therapist is actually a psychoanalyst the Court is required to utilize the "Bishop-Fuller" tests in order to guarantee this defendant's right to exculpatory evidence and confrontation rights under the 6th and 14th Amendments of the U.S Constitution and Article 12 of the Mass. Declaration of Rights. Com. v. Bishop, 416 Mass. 169 ('93) Com. v. Fuller, 423 Mass. 216, 667 NE 2d 847 ('96): Liacos id. . s. 13.5.4.

9. Gear's therapist records are mandatory exculpatory evidence in this case just as Gear's physician/hospital records are, ( and as the Court ordered the medical records - in part), per M.R.C.P - Rule 14a.

10. This Defendant, pro se, was not allowed by Judge Douglas Stoddard to argue this issue of Gear's therapist records/evidence during the "Surprise Discovery Motion Hearing" of 5-17-01.

WHEREFORE,

the defendant, pro se, motions the Court to order the prosecution to produce to the defendant the alleged "victim's", Peter h. Gear's, therapist records, as above, and as required by Federal "Brady" laws, the 6th and 14th Amendments of the U.S. Constitution and Article 12 of the Mass. Declaration of Rights.

Michael Elbery, pro se  
12 Administration Rd.  
Bridgewater, Mass. 02324  
5-28-01

*Supporting Affidavits Attached*

COMMONWEALTH OF MASSACHUSETTS

Middlesex ss

Framingham District Court

Commonwealth

Six Man Jury Session

v.

Criminal Docket

Michael Elbery

00-3006

Affidavits In Support

Defendant's Motion to Reconsider and Allow Defendant's Motion  
For

Peter H. Gear's Therapist's Records

1. I am the defendant, Michael Elbery.
2. During the Motion Hearing of 5-17-01, A.D.A. Ford argued that Gear's therapist records were protected by privilege and that they did exist.
3. I was not allowed to argue the issue of Gear's therapist records by Judge Douglas Stoddard on 5-17-01 at the Motion Hearing.

Signed under the pains and penalties of perjury on this 29th  
day of May, 2001.

Michael Elbery, pro se

Ex. A

COMMONWEALTH OF MASSACHUSETTS

Middlesex ss

Framingham District Court

Commonwealth

Criminal Docket  
#0049CR1893A (3006)

v.

Elbery

*5/17/01*  
*See*  
*Margin*  
*notations*  
*which*  
*constitute*  
*order of*  
*court*  
*Dan G. Gately*

Defendant  
Defendant

Defendant's Motion to Compel Prosecutor  
to

Produce Discovery Evidence

as

Requested by Defendant's Discovery Motions

*N/A*

1. The defendant-pro se, Michael Elbery, Motions the Court to Compel the prosecution to produce the exculpatory, relevant and material evidence asked for in the defendant's 12 discovery motions filed in this instant case.

*See*  
*other*  
*order*  
*at*  
*5/17/01*

2. There has been no Pretrial Conference or Pretrial Report regarding this instant case.

*Denise*

3. This defendant was allowed only limited participation at the Hearing Pretrial, see Defendant's "objection to Case Proceedings etc.," filed on this instant case.

*Denise*  
*Disc.*  
*hearing*  
*today*  
*5/17/01*

4. At this late date the Court has yet to discuss the defendant's discovery requests made via his motions to the prosecution.

NA 5. All the discovery per this defendant's discovery Motions are for relevant, material, exculpatory evidence.

Specific Evidence this defendant Motions the Court to Compel the Prosecution to Produce from the Defendant's already Filed Discovery Motions filed in this instant case.

See Omnibus motion 6. The defendant motions the Court to Compel the prosecution to produce the following specifically requested prosecution controlled evidence. This defendant already requested this discovery through his "Omnibus Discovery Motion"

allowed a. The Booking evidence regarding the arrest of Peter H. Gear on 7-4-00 by the Framingham Police Dept. This evidence has already been asked for by the defendant via Request #1 of his "Omnibus Motion".

allowed b. The 6 photos of Peter H. Gear taken by the Framingham Police alleging the injuries caused by this defendant. This has already been requested via #2 of the Defendant's "Omnibus Motion".

denied c. The therapists records and related information regarding treatment to the alleged victim, Peter H. Gear, needed due, allegedly, because of the beating he received causing this action. This evidence has already been requested by the defendant via his request # 5 of the defendant's "Omnibus Discovery Motion".

allowed d. The Police telephone evidence in requests #'s 6 & 8 of the defendant's "Omnibus Discovery Motion". In particular the defendant requests the prosecution to produce the computerized print outs of the calls the alleged victim, Peter H. Gear, made to the Framingham Police on 7-4-00.

The Framingham Police informed my investigating attorney on this case, Attorney Ken Brekka, that the two Gear calls, as above, were made hours after the incident; not as the the prosecution now claim immediately after the incident. See Affidavit attached.

6. In addition, the defendant motions the Court to Compel the prosecution to produce #'s 3, 4, 7, 9, 10, 14, 15, 16, 18, 19, 20, 22, 23, 25, 27, 28, 29, 30, 31, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44 of the defendant's "Omnibus Discovery Motion".

7. Gear's Hospital Records

The defendant further motions the Court to Compel the prosecution to produce the hospital and physicians records and reports that the alleged victim in this case, Peter H. Gear, incurred as a result of the underlying incident on 7-4-00 at the Route 30 Mobil that caused this instant case.

These same hospital records were requested in 3 of the defendant's Discovery Motions already filed with the Court in this case as follows:

- a. #11 Request of Defendant's "Motion for Discovery"
- b. #4 Request "Defendant's Motion to Preserve/Impound by Court & Compel for Production & Inspection of Prosecution Controlled Evidence"
- c. #1-i Request of the "Defendant's Motion for Additional Discovery"

But see Ex. D of the Defendant's "Omnibus Discovery Motion" which quotes the victim-alleged, Gear, that he went to the Hospital and was treated by a physician for weeks as a result of the underlying incident that gave rise to this action.

wherefore,

the defendant motions the Court to Compel the prosecution to produce the above discovery requests as the law of Massachusetts and Federal Brady laws require.

  
Michael Elbery, prose

SECC Prison 3-13-01

See  
omnibus  
motion

allured  
any  
new records  
to be provided  
ch. 233  
79(6)  
at least  
10 days  
before  
trial



Certificate of Service

I the defendant, pro se , Michael Elbery, sent this Motion for Gear's therapist records to the Clerk - Criminal, Framingham

District Court, 600 Concord St., Framingham, Mass.01701 and to the D.A.'s Office at 100 Concord St., Framingham, Mass.

all via U.S. certified mail- return receipt-prepaid on May 31, 2001 from SECC Prison.