COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2007-770

COMMONWEALTH

V.

ERICK COTTO
and related cases[1]

COMMONWEALTH'S MEMORANDUM ON BEHALF OF THE HAMPDEN COUNTY DISTRICT ATTORNEY'S OFFICE

Now comes the Commonwealth on behalf of the Office of the Hampden County District Attorney and respectfully submits its memorandum relative to the motions to withdraw guilty pleas or for new trials in the above-entitled actions that are before this Honorable Court. To the extent that a defendant has filed a motion to dismiss or vacate based on allegations of prosecutorial misconduct, the Commonwealth opposes the pending motion and relies upon and adopts the Office of the Attorney General's Memorandum in Opposition to Defendant's Motion to

[1] *Commonwealth v. Aponte*, 1279CR00226; *Commonwealth v. Brown*, 0579CR01159; *Commonwealth v. Harris*, 1079CR01233; *Commonwealth v. Liquori*, 1279CR00624; *Commonwealth v. Penate*, 1279CR00083; *Commonwealth v. Richardson*, 1279CR00399; *Commonwealth v. Ware*, 0779CR01072, 0979CR01072, & 1079CR00253; *Commonwealth v. Watt*, 0979CR01068 & 0979CR01069; and *Commonwealth v. Vega*, 0979CR00097.

Dismiss. Otherwise, the Commonwealth herein addresses the issues specifically identified by the Court in the Clarification Request issued on February 6, 2017.

BACKGROUND

On January 18, 2013, James Hanchett, supervisor at the Amherst drug lab, contacted the Massachusetts State Police (MSP) to report that samples of controlled substances were missing. The MSP immediately shut down the lab and began an investigation of Sonja Farak, a chemist at the lab. On January 19, 2013, Farak was arrested on charges of tampering with evidence and unlawful possession of controlled substances. Farak was arraigned in the Eastern Hampshire District Court on January 22, 2013.

A special statewide grand jury in Suffolk County indicted Farak on April 1, 2013, and she subsequently pled guilty in Hampshire Superior Court on January 6, 2014, to four counts of tampering with evidence, in violation of G.L. c.268, §13E; four counts of larceny of a controlled substance (cocaine) from a dispensary, in violation of G.L. c.94C, §37; and two counts of unlawful possession of a controlled substance (cocaine), in violation of G.L. c.94C, §34.

While Farak's case was pending, a number of defendants[2] moved to vacate their convictions/withdraw their pleas in drug cases where Farak had been identified as the chemist. These cases were consolidated and evidentiary hearings were heard by the Honorable C. Jeffrey Kinder in the Hampden Superior Court on September 9, October 7, and October 23, 2013. The hearings before Judge Kinder were limited to the timing and scope of Farak's misconduct, the timing and scope of the conduct underlying the negative findings of the October 10, 2012 quality assurance audit of the Amherst Drug Lab conducted by the MSP, and the extent to which Farak's misconduct and the audit findings might relate to the testing of drug evidence in the individual defendant's cases. *See* Exhibit #185.

After hearing the evidence, Judge Kinder concluded, in regards to the Amherst Lab, "that while the negative findings in the October 2012 Quality

[2] The defendants included Jose Garcia (0679CR0064), Erick Cotto (0779CR0770), Jermaine Watt (0979CR1068 & 0979CR1069), Alfred Andrews (1079CR1060), Rafael Rodriguez (1079CR1181), Emilio Martinez (1079CR1220), Omar Harris (1079CR1233), Hector Vargas (1179CR0290), Deon Charles (1179CR0461), Marie Vargas (1179CR0801), William Guzman (1279CR0055), Jorge Diaz (1279CR0365), Kathleen Carter (1079CR0115), Jose Torres (1079CR0554), and Nathan Berube (1179CR0355).

Assurance Audit reflect a lax atmosphere in which theft of controlled substances could go undetected for a period of time, the audit did not reveal any unreliable testing." *Ibid.* As to Farak's misconduct, Judge Kinder found that there was "powerful evidence" that she was stealing cocaine and replacing it with other substances as early as the summer of 2012. Judge Kinder was not persuaded that it was reasonable to infer from Farak's possession in her car of newspaper articles that were printed in 2011 that she was stealing controlled substances at that time. *See Commonwealth v. Cotto,* 471 Mass. 97, 111, n. 13 (2015). Furthermore, Farak's co-workers, James Hanchett, Sharon Salem, and Rebecca Pontes, testified that they had only noticed deterioration in Farak's appearance and productivity within six months of her arrest (Tr. 9/9/13 at 224-225, 227, 228-229; Tr. 10/07/13 at 121-123, 164, 185, 192).[3]

Judge Kinder relied on the analysis articulated in *Ferrara v. United States*, 456 F.3d 278, 290 (1st Cir. 2006) and denied those motions where the

[3] The citations used in the Commonwealth's memorandum are as follows: The Commonwealth's appendix is cited as (C.A./page) and citations to transcripts are cited with the transcript date and page. Exhibits are identified by number.

defendant could not show that Farak's misconduct antedated their plea.[4] Erick Cotto, Jr. was one such defendant. Cotto appealed and the Supreme Judicial Court granted his application for direct appellate review. After hearing, the Supreme Judicial Court found that Farak's misconduct was egregious and that it was attributable to the Commonwealth. *Cotto,* 471 at 107. However, the court concluded that the evidence was insufficient at that time to establish that Farak's misconduct antedated the entry of Cotto's plea. The Supreme Judicial Court ordered that the "Commonwealth thoroughly investigate the timing and scope of Farak's misconduct at the Amherst drug lab in order to remove the cloud that has been cast over the integrity of the work performed at that facility." *Cotto, supra* at 115.

INVESTIGATION INTO THE TIMING AND SCOPE OF FARAK'S MISCONDUCT AT THE AMHERST DRUG LAB PURSUANT TO THE *COTTO* DECISION

The Massachusetts Attorney General's Office (AGO) undertook the investigation of Farak on behalf of the Commonwealth. As part of its investigation, the Attorney General's Office convened two grand juries

[4] Judge Kinder concluded that Farak was an agent of the Commonwealth by virtue of her role at the Amherst drug lab.

and took testimony from Farak, her co-workers at the Amherst drug lab (Hanchett, Salem, and Pontes), and Nancy Brooks, from the Massachusetts State Police (MSP) crime laboratory. On November 5, 2015, in response to the June 1, Scheduling Order, the AGO reported a summary of its investigation to that date:

> 1. Ms. Farak began using controlled substances regularly in the last quarter of 2004;
> 2. Ms. Farak was under the influence of controlled substances during a vast majority of her working hours from the last quarter of 2004 to her removal from the lab on January 18, 2013;
> 3. Ms. Farak began stealing from police submitted samples in the last quarter of 2009 until her removal from the lab on January 18, 2013. She began regularly taking from samples in the first quarter of 2011. The majority of samples tampered with were powder and base cocaine. In addition, there was evidence of tampering with hallucinogens, specifically lysergic acid diethylamide (LSD). There has been no evidence found at this point that there was any tampering that included heroin or opiods.[5]

On April 1, 2016, the AGO issued its Investigative Report Pursuant to *Commonwealth v. Cotto*, 471 Mass. 97 (2015). The report further detailed the extent of Farak's misconduct through the testimony of the witnesses who had appeared before the Hampshire County grand jury, as well as an interview

[5] There is no evidence that Farak ever tampered with heroin and the evidence is insufficient to prove that she used opiods.

with Annie Dookhan, the defendant in the Hinton Dug Lab scandal.

Farak testified before the grand jury pursuant to a proffer. Farak admitted that she began to consume methamphetamine from the Amherst lab's standards late in 2004 or early 2005. In 2009, having nearly exhausted the meth standard, Farak turned to amphetamine and phentermine to maintain her habit. She also began using other lab standards, including ketamine, MDMA, and LSD, in addition to the cocaine standard. In early 2009, Farak began to use a small amount from police-submitted samples. In 2010, while still using the standards heavily, Farak attempted to get help with her addiction. Nonetheless, by the middle of 2011, her drug use had increased and she began taking from police-submitted samples and lab standards of base (crack) cocaine.

Farak admitted that as her addiction increased, so did her theft and consumption of police-submitted samples. In the summer of 2012 Farak began stealing from the samples of Hanchett and Pontes. Farak admitted that she manipulated approximately one-half dozen of Hanchett's samples of crack cocaine, using

his pre-initialed bags, and one sample that Pontes had analyzed, using a pre-initialed bag. The evidence supported the theory that Farak would take samples that had already been analyzed and replaced them with counterfeit substances like soap, baking soda, or oven-baked clay, so that the weight of the sample remained the same.

COMMONWEALTH'S CONCESSION OF EGREGIOUS GOVERNMENT MISCONDUCT BY FARAK AND SATISFACTION OF THE TWO PRONG ANALYSIS ESTABLISHED BY *FERRARA* AND *SCOTT* IN CASES WHERE THE DEFENDANT MOVES TO WITHDRAW A GUILTY PLEA OR FOR A NEW TRIAL

Based on Farak's admissions, Berkshire District Attorney David F. Capeless, on behalf of the District Attorneys for all the Commonwealth's districts, issued Commonwealth's Statement of Acceptance of Finding of "Egregious Governmental Conduct:"

> where there is a certificate of drug analysis signed by former Department of Public Health chemist Sonja Farak as "Assistant Analyst", the Commonwealth will not contest a finding by the Court of "egregious governmental conduct" on Farak's part in the performance of her duties while at the Department of Public Health Laboratory, pursuant to the first part of the two-prong analysis set out in the case of *Commonwealth v. Scott*, 467 Mass. 336 (2014).

Exhibit #164.

The Commonwealth thereby concedes that where Farak has signed the certificate of drug analysis in the

defendant's case, the defendant is entitled to a conclusive presumption that Farak's misconduct occurred in his case, that it was egregious, and that it is attributable to the Commonwealth. *Commonwealth v. Scott*, 467 Mass. 336, 338 (2014). Furthermore, the Commonwealth stipulates that Farak's egregious misconduct occurred during the entire period in which she worked at the Amherst lab, from 2004 until her arrest in 2013.[6]

Furnishing a drug certificate signed by Farak in the defendant's case "satisfies the defendant's evidentiary burden to establish each element of the first prong of the *Ferrara* analysis." *Scott, supra* at 353. However, a defendant who satisfies the first prong of the *Ferrara-Scott* analysis by producing a certificate of analysis signed by Farak is not relieved of his burden under the second prong of the analysis which requires him to particularize Farak's

[6] The Commonwealth declines to stipulate to any misconduct by Farak during the period she was employed as a chemist at the Hinton drug lab. There is no direct evidence of her misconduct at that time. Farak specifically denied "dry-labbing" and any inference that the defense has drawn from statistics is insufficient proof of criminal actions by her.

misconduct to his decision to tender a guilty plea. *See Scott, supra* at 354.

Numerous factors go into the calculation by a defendant to enter a plea of guilt. *See Scott, supra* at 355, citing *Ferrara*, 456 F.3d at 294 (reciting factors relevant to a defendant's showing under the second prong). The court must "determine whether, in the totality of the circumstances, the defendant can demonstrate a reasonable probability that had he known of [Farak's] misconduct, he would not have admitted to sufficient facts and would have insisted on taking his chances at trial." *Scott, supra* at 358, citing *Commonwealth v. Clarke*, 460 Mass. 30, 47 (2011); *Ferrara*, 456 F.3d at 294.

The Supreme Judicial Court has declined to relieve the defendant of the burden of proving prejudice under the second prong of the *Ferrara-Scott* analysis. *See Cotto, supra* at 116, citing *Scott, supra* at 354, *Commonwealth v. Chatman*, 466 Mass. 327, 333 (2013). "[E]vidence of the circumstances surrounding the defendant's decision to tender a guilty plea should be well within the defendant's reach." *Scott, supra* at 354 n. 11. In the recent

decision in *Bridgeman v. District Attorney for Suffolk District*, 476 Mass. 298, *14 (2017) (*Bridgeman II*), the Supreme Judicial Court reaffirmed its position on the second prong and rejected the Bridgeman petitioners' request for a remedy which "would effectively declare a conclusive presumption of prejudice."

NEW TRIALS SHOULD BE GRANTED WHERE THE DEFENDANT HAS DEMONSTRATED THAT JUSTICE MAY NOT HAVE BEEN DONE PURSUANT TO THE STANDARD UNDER MASS. R. CRIM. P. 30(b) OR HAS SATISFIED BOTH PRONGS OF THE *FERRARA-SCOTT* ANALYSIS

The Commonwealth assents to the motions for a new trial filed by the defendants in the following cases:

1. Omar Harris, 1079CR01233

On November 18, 2010, a Hampden County grand jury returned indictments against Omar Harris on charges of trafficking in cocaine (14-28 grams) as a habitual offender under G.L. c.279, §25, and violation of a drug free school or park zone. On September 21, 2011, the defendant tendered a guilty plea on so much as alleged trafficking in cocaine on count 1. The Honorable Cornelius J. Moriarty accepted the defendant's plea and sentenced him to MCI-Cedar Junction for not more than twelve years and not less

than ten years. Count 2 was nol prossed by the Commonwealth. (C.A./4-5, 8).

The evidence in the defendant's case was analyzed on November 16, 2010 by Farak. (C.A./16).

On July 12, 2013, the defendant filed a motion to vacate his guilty plea based on the discovery of Farak's misconduct at the Amherst Drug Lab. (C.A./8). On November 12, 2013, the defendant's motion was denied by Judge Kinder who found that Farak's misconduct only dated back to the "summer of 2012." (C.A./9). Exhibit #186.

On April 8, 2015, the Supreme Judicial Court decided *Cotto* which propelled a thorough investigation into the timing and scope of Farak's misconduct. On June 8, 2015, the drugs in the defendant's case were submitted to the MSP lab. They were retested and determined to be approximately 17 grams of cocaine, an amount less than that certified by Farak in 2010. (C.A./14). On July 24, 2015, the defendant filed a motion to reconsider the denial of his motion to withdraw his guilty plea based on the revelation that Farak's misconduct at the Amherst Drug Lab continued

throughout her employment there, from 2004 to 2013. (C.A./10).

The Commonwealth assents to the defendant's motion to withdraw his guilty plea and for a new trial. The certificate of analysis in the defendant's case was signed by Farak and he has therefore satisfied the first prong of the *Ferrara-Scott* analysis. The certificate of analysis was the only evidence of either the weight or the content of the bag of white chunks recovered from the defendant at the scene. The case against the defendant was not otherwise strong.

As to the second prong, the Commonwealth agrees with Harris that, had he known of Farak's misconduct, it would not have been unreasonable for him to either forego the plea or to bargain for a better deal, as both the defendant and his counsel have averred. Although he received a charge concession, the sentence that was imposed was nevertheless a long one.

2. Rolando Penate, 1279CR00083

On January 10, 2017, the Court held a hearing in Mr. Penate's case. At that time, the Commonwealth assented to the defendant's motion for a new trial due

to a convergence of circumstances that casts real doubt on the justice of Mr. Penate's conviction. *See Commonwealth v. Wright*, 469 Mass. 447, 461 (2014) ("Where a defendant seeks a new trial on the basis of newly discovered evidence, he 'must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction'"); *Commonwealth v. Weichell*, 446 Mass. 785, 798 (2006).

The defendant was convicted in 2013 of distributing heroin. (C.A./30). The certificates of analysis from Farak's testing identified the substances as heroin. (C.A./36-46). The substances were retested in Worcester by William Hebard prior to the defendant's trial and confirmed to be heroin. (C.A./48-60).

During the trial, the jury were made aware of Farak's misconduct. In his opening, trial counsel referred to Farak as a "crooked chemist." The defendant pressed the theory that the police work, including that of Farak, was "slopp[y]." In addition, the parties entered into a stipulation which was read to the jury:

> Items alleged to be controlled substances in this case and seized by the Springfield police and

> only sent to a laboratory in Amherst for testing, these items were sent in October and November of 2011 and tested between December of 2011 and January of 2012 by Sonja Farak, a chemist for the Department of Public Health. In January of 2013, Ms. Farak was arrested and charged with evidence tampering involving alleged heroin and cocaine. As a result of her pending indictment, Ms. Farak is unavailable to testify in this case and no testimony can or will be offered concerning the result of any testing she may have performed. The court has found that tampering by Ms. Farak occurred *as early as July of 2012*.

Although the jury were informed of Farak's misconduct, trial counsel was unable to fully utilize that information and develop his defense during the trial. The second chemist, William Hebard, testified, but Judge Page restricted trial counsel's cross examination based on Judge Kinder's finding that Farak's misconduct did not occur prior to the summer of 2012, and it is reasonable to assume that the jury similarly interpreted the stipulation, which stated that Farak's misconduct occurred "as early as July 2012," as a limitation on Farak's misconduct. Exhibit #170. Judge Page also did not allow trial counsel to question Rebecca Pontes, who he had called as a witness for the defense, about the procedures and conditions at the Amherst lab. *See Commonwealth v.*

Vardinski, 438 Mass. 444, 450 (2003) (right to cross examine is fundamental).

Newly discovered evidence concerning the extent of Farak's misconduct, including her admission that on January 9, 2012 -- which was the day she analyzed the substances in the defendant's case -- she was high on LSD, and the discovery that currency that was admitted into evidence at the defendant's trial as circumstantial evidence of distribution had not been in circulation at the time Penate was arrested[7] would have had a profound effect on the defendant's trial and probably would have been a real factor in the jury's determination. *See Commonwealth v. Ellis*, 475 Mass. 459, 479 (2016) ("[A] reasonable jury likely would have had diminished confidence in the integrity and thoroughness of the police investigation in general. Not only would this likely have caused them to question the reliability of some of the evidence presented by the prosecution, it also may have elevated in significance certain aspects of the

[7] Kevin Burnham has been indicted for stealing money from the evidence room at the Springfield Police Department. Burnham was a witness at the defendant's trial. He testified about the chain of custody of the drugs.

investigation that may otherwise have appeared unimportant").

Considering the unique circumstances in Penate's case, a new trial should be granted.

IN THOSE CASES WHERE THE DEFENDANT HAS FILED A MOTION TO WITHDRAW A GUILTY PLEA OR FOR A NEW TRIAL BASED ON FARAK'S MISCONDUCT AND FAILS TO SATISFY ONE OR BOTH PRONGS OF THE *FERRARA-SCOTT* ANALYSIS, THE DEFENDANT'S MOTION SHOULD BE DENIED

The Commonwealth opposes the motions for a new trial that have been filed in the following cases:

1. Glenda Aponte, 1279CR00226[8]

On March 6, 2012, a Hampden County grand jury returned indictments against the defendant, Glenda Aponte, on three counts of distribution of cocaine as a subsequent offense (counts 1, 3, & 5), and three counts of violating a drug free school or park zone (counts 2, 4, & 6). (C.A./62-63). The charges arose from three undercover purchases of crack cocaine from the defendant at her apartment at 339 Boston Road in Springfield on November 11 and 12, 2011, and on

[8] The defendant has incorporated an earlier indictment (0779CR00826) in her arguments to the Court. It is the Commonwealth's understanding that the 2007 indictment is not included in the present litigation. The defendant was not convicted as a subsequent offender when she pled guilty in 2013.

The drug evidence in the 2007 case has been retested at the MSP lab and determined to be base cocaine. (C.A./80).

February 15, 2012. (C.A./72-74). The evidence in the defendant's case was sent to the Amherst drug lab and was analyzed by James Hanchett on January 5, 2012 (A11-04217) and by Sonja Farak on January 6, 2012 (A11-04271) and April 24, 2012 (A12-00940). (C.A./76-78).

On October 16, 2012, the defendant tendered a guilty plea on counts 1, 3, and 5, charging her with distribution of cocaine. The Commonwealth nol prossed the school zone charges (counts 2, 4, and 6). The defendant was sentenced to concurrent terms of three and one-half to four and one-half years, to be served at MCI-Cedar Junction. On count 5, she was sentenced to two years of probation from and after the sentences imposed on counts 1 and 2. A stay of execution of sentence was allowed on May 17, 2013. (C.A./66-67).

On or about June 26, 2013, the defendant filed a motion for a new trial in a "drug lab case." On December 30, 2013, the defendant's motion was allowed by the Honorable C. Jeffrey Kinder pursuant to an agreed sentencing recommendation and the defendant pled guilty to so much as alleged a violation of G.L. c.94C, §32A(a). At that time, Judge Kinder sentenced

the defendant to a term of two and one-half years to be served at the Hampden County House of Correction on count 1, with six months on count 3 to be served from and after the sentence imposed on count 1. The defendant was placed on probation for two years from and after the sentence imposed on count 3. The sentence was stayed until January 24, 2014, at which time Judge Kinder, at the defendant's request, allowed the sentence to be served on weekends only. (C.A./67).

On December 11, 2015, the defendant filed a motion to vacate her convictions and for the sanction of dismissal.[9] That motion, which is now before the Court, is opposed by the Commonwealth. (C.A./67).

As stated, *supra*, two of the three certificates in the defendant's case were signed by Farak, and, as to those two charges, the defendant has satisfied the first prong of the *Ferrara-Scott* analysis. The third certificate of analysis was signed by Hanchett, and in order to satisfy the first prong of the analysis on that count, the defendant relies on generalizations concerning Farak's misconduct unrelated to Hanchett's

[9] To the extent the defendant's motion to dismiss or vacate based on prosecutorial misconduct is before the Court, the Commonwealth opposes the motion and relies upon and adopts the Office of the Attorney General's Memorandum in Opposition.

testing of the evidence in her case, and she also criticizes the fact that the Amherst lab conducted tests using "secondary standards." The defendant's claims lack the specificity mandated by *Scott* which requires the defendant to show that egregious government misconduct occurred in her case and prior to her plea. *See Scott, supra* at 347-351. "Contrary to the defendant's argument, it is not enough simply to show that problems occurred in the lab, however egregious they were; [she] needed to demonstrate a connection between those problems and [her] case." *Commonwealth v. Nelson*, 90 Mass. App. Ct. 594, 596, *review denied*, 476 Mass. 1107 (2016).

The fact that Hanchett created secondary standards for use in testing does not lead to the conclusion that the evidence in the defendant's case was compromised. Hanchett testified that he used leftovers from samples that had already been analyzed and he purified them before they were tested against an unknown evidence sample. In addition, when the secondary standard was used to analyze a sample, it went through a presumptive test as well as the Gas Chromatograph - Mass Spectrometry instrument which ran

the sample being tested against both the internal library provided by the manufacturer and the library supplied by the lab. Any discrepancy or problem with the standard would have been noticed by the chemist who reviewed the test results and who would have re-analyzed the sample if there had been a problem.

Dr. Robert Powers, the Commonwealth's expert witness, testified that even though secondary standards are not currently used in accredited labs, their use does not render the test results unreliable. The fact that the Amherst lab was not shut down when it was taken over by the MSP is indicative of the reliability of the testing that occurred at the lab aside from the admitted misconduct of Farak.

Whether or not this Court finds that the defendant has satisfied the first prong of the *Ferrara-Scott* analysis in all three charges, she still is required to show a reasonable probability that she would not have pled guilty to drug charges and would have insisted on going to trial. *See Wilkins v. United States*, 754 F.3d 24, 28 (1st Cir. 2014). Here, the defendant pled guilty a second time after the Commonwealth assented to her first motion to vacate

her plea and for a new trial. The defendant received a significant benefit to pleading guilty rather than proceeding to trial since the subsequent offender charges were dropped and the defendant received a sentence of two and one-half years to the house of correction on count 1, 6 months on and after on count 2, and probation with conditions on count 3. Had the defendant gone to trial, she faced a potential penalty on the original charges of three and one-half to fifteen years in state prison on each count of distribution as a subsequent offense. Furthermore, as a result of her plea, Judge Kinder allowed the defendant to serve her sentence on weekends only.

It was reasonable for the defendant to plead guilty since there was powerful circumstantial evidence of her guilt. Detective Garcia of the Springfield Police Department conducted three undercover hand-to-hand transactions of cash for a "twenty," a "forty," and for four off-white chunks consistent with crack cocaine. The exchanges took place at the defendant's home on three different dates. In one instance, on November 8, 2011, the

defendant was smoking the crack in the officer's presence. (C.A./72-74).

There is no evidence that the defendant had a substantial ground of defense that she would have pursued at trial. *See Commonwealth v. Resende*, 475 Mass. 1, 18 (2016). The defendant points to no evidence showing that the substance she sold to Detective Garcia was anything other than crack cocaine. Finally, the defendant admitted to her factual guilt not once, but twice in open court. Her admission is entitled to significant weight. "And such admission is especially compelling because [she] neither attempts to explain it away nor makes any assertion of factual innocence." *Wilkins*, 754 F.3d at 30.

2. Erick Cotto, Jr., 0779CR00770

Erick Cotto, Jr. was indicted on charges of trafficking cocaine (28-100 grams) and possession of ammunition without an identification card and being an armed career criminal. G.L. c.269, §10G(b). The defendant satisfied the first prong of the *Ferrara-Scott* analysis through certificates of analysis showing that Farak analyzed the evidence in his case

on June 8, 2007 (#183344, #183345, #183346). (C.A./99-100).[10]

On April 13, 2009, the defendant pled guilty to so much of the indictment that alleged trafficking cocaine (14-28 grams) and possession of ammunition. He was sentenced upon an agreed recommendation to five years in state prison on count 1 with a concurrent sentence of one year to the house of correction on count 2. On or about April 25, 2013, the defendant filed a motion to withdraw his plea based on the discovery of Farak's misconduct at the Amherst drug lab. The defendant's motion was denied on October 30, 2013 by Judge Kinder who found that the defendant failed to establish that Farak's misconduct antedated his guilty plea. (C.A./88, 89). Exhibit #184.

The defendant appealed, *see Cotto, supra,* and the Supreme Judicial Court remanded his case for reconsideration of the second prong of the *Ferrara-Scott* analysis "to determine whether, in the totality of the circumstances, the defendant can demonstrate a reasonable probability that had he known of [Farak's]

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[10] The evidence in the defendant's case was submitted to the MSP lab in Springfield for retesting on December 28, 2016. The certificate of analysis shows the presence of cocaine. (C.A./102).

misconduct, he would not have [pleaded guilty] and would have insisted on taking his chances at trial." *Cotto, supra* at 117, quoting *Scott, supra* at 358.

The Commonwealth opposes the defendant's motion to withdraw his plea since Cotto fails to sustain his burden under the second prong of the *Ferrara-Scott* analysis.

The defendant received charge and sentencing concessions by pleading guilty. *See Scott, supra* at 357 (terms of sentence reduction relevant to inquiry under second prong of *Ferrara*). The Commonwealth reduced the trafficking charge from between 28 and 100 grams to between 14 and 28 grams and waived the subsequent offender enhancement in connection with the ammunition charge. As a subsequent offender, the defendant faced a minimum mandatory sentence of not less than three years on the ammunition charge and could have been sentenced to up to fifteen years. *See* G.L. c.269, §10G(b). *See Scott, supra* at 357 (whether the defendant is indicted on additional charges is a relevant factor in the prong two analysis). Under the statutory provisions then in effect, Cotto faced a minimum mandatory sentence of five years on the

(unreduced) trafficking charge and could have been sentenced to up to twenty years. *See* G.L. c.94C, §32E(b)(2) (as in effect April 13, 2009). The Commonwealth offered concurrent sentences resulting in committed time of five years.

There was very strong circumstantial evidence supporting the drug charges against the defendant: the officers found eight packages of what appeared to be cocaine packaged for street level distribution on the defendant when they arrested him, and he *admitted* that he had additional drugs in his apartment, along with packaging materials and scales, all of which was located -- with the ammunition -- when the apartment was searched. *See Wilkins,* 754 F.3d at 29 (powerful circumstantial evidence of drug dealing relevant to prejudice prong of *Ferrara* in Dookhan case); *Scott, supra* at 358 (same). While the defendant had a suppression motion pending at the time of his plea, his attorney told the court it was "not dispositive" and there is no other indication that the defendant had a substantial defense to the charges.

The defendant admitted his factual guilt (including the nature of the contraband sold) in open

court at the time he changed his plea. He has never attempted to deny that guilt or deny that the substance in the bags seized was, in fact, cocaine. *See Wilkins*, 754 F.3d at 30 (admission made in open court entitled to significant (albeit not dispositive) weight).

3. Wendell Richardson, 1279CR00399

On April 17, 2012, a Hampden County grand jury indicted Wendell Richardson on charges of distribution of cocaine as a subsequent offense (count 1), and violation of a drug free school or park zone (count 2). On November 5, 2012, the defendant pled guilty before the Honorable John S. Ferrara to so much of count 1 as charged distribution of cocaine. The defendant was sentenced to a term of three years to three years and a day to be served at MCI-Cedar Junction with credit for 290 days. The school zone charge was nol prossed by the Commonwealth. (C.A./104, 106).

The evidence in the defendant's case was submitted to the lab in Amherst on January 25, 2012. It was analyzed by Sonja Farak on March 15, 2012 and certified to be .05 grams of cocaine. On June 8,

2015, the evidence was submitted to the MSP lab where it was again analyzed and found to be .03 grams cocaine. (C.A./110-112).

On February 26, 2015, the defendant filed a motion to withdraw his guilty plea based on the discovery of Farak's misconduct at the Amherst drug lab. (C.A./106). The Commonwealth opposes the defendant's motion even though he is entitled to the presumption that egregious government misconduct occurred in his case, because he fails to show that it would have been rational to go to trial in the circumstances of his case.

"Under the second prong of the *Ferrara-Scott* framework, 'the defendant must demonstrate a reasonable probability that he would not have pleaded guilty if he had known of [Farak's] misconduct,'" *Cotto, supra* at 106, quoting *Scott, supra* at 354-355; *see Ferrara,* 456 F.3d at 290, 294, and "would have insisted at taking his chances at trial." *Scott, supra* at 358. At a minimum, the defendant must aver to that fact. *Scott, supra* at 356, citing *Clarke, supra* at 47. It is significant that the defendant

fails to support his motion with an affidavit that makes that claim.

The defendant's showing on the second prong is lacking. First, he sold crack cocaine to an undercover officer who asked for a "twenty," which is a common name for twenty dollars' worth of crack cocaine, and he was apprehended at the scene. Second, Richardson admitted to the plea judge that he was an addict and was guilty. Also, when asked by the judge to tell him, in his own words, what the charge was, the defendant responded, "Distribution of Class B substance." When the judge then asked what the substance was, the defendant responded, "Crack cocaine." (C.A./114-118). The defendant does not contradict his admission of guilt. *See Wilkins,* 754 F.3d at 30 (denying the defendant's attack on his guilty plea based upon the fact that Dookhan tested the drugs in his case and holding that the "defendant admitted his factual guilt (including the nature of the contraband sold) in open court at the time that he changed his plea. This admission is entitled to significant (albeit not dispositive) weight when, as now, he seeks to vacate the plea through a collateral

attack... And such admission is especially compelling because the [defendant] neither attempts to explain it away nor makes any assertion of factual innocence") (internal citations omitted).

If the defendant, who had a significant record, had been convicted of the original charges, he could have been sentenced to seventeen years in state prison. *See* G.L. c. 94C, §32A(c) & (d) and §32J. Instead, he pled to the lesser offense and received a state prison sentence of three years to three years and a day with credit for 290 days. The school zone charge was nol prossed. Under the circumstances, it would not have been reasonable for the defendant to take his chances at trial.

4. Fiori Liquori, 1279CR00624

The defendant, Fiori Liquori, was indicted on June 28, 2012 by a Hampden County grand jury on charges of unlawful distribution of a Class B substance (oxycodone) (counts 1 & 3), unlawful distribution of a Class B substance (oxymorphone) (count 2), unlawful possession of a Class B substance (oxycodone) with intent to distribute (count 4), unlawful possession of a Class B substance

(oxymorphone) with intent to distribute (count 5), unlawful possession of a Class E substance (Zolpidem) with intent to distribute (count 6), unlawful possession of a Class E substance (Carisprodol) with intent to distribute (count 7), unlawful possession of a Class E substance (Tramadol) (count 8), unlawful possession of a Class B substance (Suboxone) (count 9), and unlawful possession of ammunition without an identification card as an armed career criminal (count 10). On May 8, 2013 count 10 was tried before the Honorable Daniel A. Ford who allowed the defendant's motion for a required finding of not guilty. Counts 6 and 7 were nol prossed by the Commonwealth prior to trial. (C.A./120-121, 125-126).

The substances in the defendant's case were sent to the Amherst drug lab on May 18, 2012 and were analyzed by Farak on June 22, 2012. (C.A./134-149). The substances were retested prior to the defendant's trial at the MSP lab in Sudbury. (C.A./150).

On July 8, 2013, the defendant filed a motion to dismiss based on egregious government misconduct which was denied by Judge Kinder on October 30, 2013. (C.A./126, 127).

The defendant proceeded to trial before the Honorable Mary Lou Rup and a jury from September 9 through September 16, 2014. The defendant's motion for a required finding of not guilty was allowed on count 9. The defendant was found guilty on counts 1, 3, 4, 5 & 8 and was acquitted of count 2. The defendant was sentenced to serve two and one-half years in the Hampden County House of Correction on count 1. On count 3, the defendant was sentenced to two and one-half years in the Hampden County House of Correction, concurrent with the sentence imposed on count 1. On counts 4, 5 & 8, the defendant was placed on probation, with conditions, from and after the sentence imposed on count 1. (C.A./128).

The defendant filed a notice of appeal. The case was stayed in the Appeals Court on August 7, 2015 and the defendant was granted leave to file a motion for a new trial. (C.A./130).

On August 7, 2015, the defendant filed a motion for a new trial based on a claim of newly discovered evidence regarding Farak's misconduct at the Amherst drug lab prior to 2012. The Commonwealth opposes the defendant's motion for a new trial because the

defendant fails to show that additional evidence of Farak's misconduct "would have been a real factor in the jury's deliberations." *Commonwealth v. Grace*, 397 Mass. 303, 305 (1986).

"A defendant seeking a new trial based on 'newly discovered evidence' 'must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction.'" *Commonwealth v. Caruso*, 85 Mass. App. Ct. 24, 29 (2014), quoting *Grace, supra* at 305. The Commonwealth agrees that the evidence of Farak's misconduct prior to July 2012 is new. But in view of the trial evidence, including extensive testimony regarding Farak's misconduct, and the retesting of the substances, the defendant fails to sustain his burden of demonstrating that new evidence of Farak's misconduct would have made a difference in the jury's conclusion. *Commonwealth v. Wright*, 469 Mass. 447, 461 (2014).

Lisa Yelle of the MSP drug lab, who retested the substances in the defendant's case, testified at trial and was subject to cross-examination by the defendant. In a similar case in which Dookhan was the original

analyst and retesting was conducted prior to trial, the Appeal's Court held:

> [T]he defendant did not demonstrate a sufficient nexus between governmental misconduct and his conviction to require reversal... He asserts that the fact that the misconduct occurred during the time his samples were initially tested at the lab is alone sufficient to provide the required nexus. However, the samples in this case were also subject to testing by another chemist,... who testified at the defendant's trial. The jury were entitled to rely on the physical evidence and testimony presented by [the second chemist], and to find that the defendant possessed illegal drugs when he was arrested.

Commonwealth v. Curry, 88 Mass. App. Ct. 61, 63-64, *review denied*, 473 Mass. 1102 (2015). The presumption of egregious government misconduct "shall not apply in a trial in which the defendant seeks to impeach the testing process utilized at the ...lab." *Contrast Commonwealth v. Francis*, 474 Mass. 816, 825 (2016) (conclusive presumption applied where drug certificates were admitted as evidence but the defendant had no knowledge of Dookhan's misconduct and therefore no opportunity to challenge the admissibility or credibility of that evidence).

Witnesses testified for the defense regarding Farak's misconduct. Sharon Salem, the evidence officer at the Amherst drug lab, described evidence of

Farak's misconduct at the lab, including missing evidence samples. Salem indicated that Farak had tested evidence from Shawn Morton, Xavier Sands, Byron Strafford and Richard Charles and certified that the substances were cocaine. However, when the drugs were retested in the Morton case, the analyst found that some bags had been opened and contained a soap-like substance and a "tiny" amount of cocaine. Exhibits ## 34, 35, 36 & 37. Springfield narcotics officer Greg Bigda testified about the substances seized in the Eric Finch and Jessica Espinosa cases where the 51 pills submitted to the lab and which Bigda thought were oxycodone, were analyzed by Farak and returned as 61 pills containing no narcotics. In addition, the parties stipulated to the results from the retesting of the drugs in the Byron Stafford, Xavier Sands, and Richard Charles cases -- all of which indicated tampering by Farak. Exhibits #29, 30, 31, 32 & 33. Finally, the defendant's closing argument centered on Farak's misconduct and the fact that she tampered with the drugs in the defendant's case. Exhibit #159.

Because additional evidence of Farak's misconduct would have been cumulative of the evidence before the

jury, the defendant is not entitled to a new trial. *See Commonwealth v. Lykus*, 451 Mass. 310, 326 (2008) ("Newly discovered evidence that is merely cumulative of evidence admitted at the trial will carry little weight").

5. Bryant Ware, 0779CR1072, 0979CR1072, 1079CR0253

On August 29, 2007, a Hampden County grand jury returned a five-count indictment, 0779CR1072, against the defendant charging him with possession of cocaine with intent to distribute (count 1); possession of marijuana (count 2); violation of a drug free school or park zone (count 3); possession of a firearm without an FID card (count 4); and conspiracy to violate the drug laws (count 5). On May 21, 2008, the defendant pled guilty to the charges in counts 1, 2 and 4 before the Honorable Tina S. Page. On count 1, he was sentenced to two and a half years in the house of correction, with one year to serve and the balance suspended with probation for two years. On counts 2 and 4, he was sentenced to six months in the house of correction, to be served concurrently with the committed sentence on count 1. (C.A./154-155, 158).

On November 25, 2009, another Hampden County grand jury returned an indictment, 0979CR1072, against the defendant, charging him with distribution of cocaine as a subsequent offense. He was further charged with a violation of the probation imposed on him when he pled guilty to charges brought against him in indictment 0779CR1072. (C.A./163).

On March 9, 2010, another Hampden County grand jury returned an eight-count indictment, 1079CR0253, against the defendant, this time charging him with possession of heroin with intent to distribute (count 1); violation of a drug free school or park zone (count 2); five counts of assault and battery with a dangerous weapon (counts 3-7); and resisting arrest (count 8). (C.A./170-171).

On February 4, 2011, the defendant pled guilty to the charges in count 1 and counts 3 through 8 in indictment 1079CR0253, the single count in indictment 0979CR1072, and to a violation of the probation imposed in connection with indictment 0779CR1072. The Commonwealth entered a nolle prosequi on count 2 of indictment 1079CR0253. (C.A./173-174).

Judge Page sentenced the defendant to not more than seven and not less than five years in state prison on the single charge in indictment 0979CR1072. On indictment 1079CR0253, the defendant was sentenced to state prison for not more than seven years and not less than five years on count 1, to run concurrent with the sentence imposed on the charge in indictment 0979CR1072; on count 3, to probation for eighteen months from and after the sentence on count 1; and on counts 4-8, to probation for eighteen months, that probationary period to run concurrent with the probationary period imposed on count 3. The probation violation netted the defendant commitment to the house of correction for the eighteen month suspended portion of the sentence imposed on him on May 21, 2008, to run concurrent with the state prison sentence imposed on the charge in indictment 0979CR1072. (C.A./173).

On August 12, 2013, the defendant filed a motion for a new trial supported by his affidavit in the case with docket number 0979CR1072. On February 14, 2014, the defendant filed a motion pursuant to Mass. R. Crim. P. 30(c)(4) for leave to conduct postconviction discovery related to possible misconduct by Farak.

(C.A./166). The motion was denied by Judge Kinder and the defendant filed a notice of appeal. The Supreme Judicial Court allowed direct appellate review. *See Commonwealth v. Ware,* 471 Mass. 85 (2015).

On June 1, 2015, the defendant filed a motion, pursuant to Mass. R. Crim. P. 30(b), to vacate his convictions and the finding of a probation violation. (C.A./168). The Commonwealth opposes the defendant's motion in regards to 0779CR1072 because the defendant has failed to show that egregious government misconduct occurred in his case. The defendant has not presented any evidence as to who analyzed the drugs in his 2007 case, *see Scott, supra* at 352 (defendant entitled to conclusive presumption "where the defendant proffers a drug certificate from the defendant's case signed by Dookhan").

The Commonwealth also opposes the defendant's motion to vacate his plea in the 2009 and 2010 cases. In those cases, the defendant is entitled to a conclusive presumption of egregious government misconduct since Farak was the analyst who signed the certificates in those matters. (C.A./178, 179). Having thereby satisfied the first prong of the

Ferrara-Scott analysis, the defendant must also satisfy the second prong and "demonstrate a reasonable probability that he would not have pleaded guilty had he known of [Farak's] misconduct." *Scott, supra* at 354-355. In the totality of the circumstances, the defendant fails to demonstrate a reasonable probability that he would have taken his chances and gone to trial on all the charges that he was facing on February 4, 2011 when he pled guilty. On that basis, the Commonwealth opposes the defendant's motion.

The Commonwealth's evidence in connection with indictment 0979CR1072 included strong circumstantial evidence of drug distribution: the defendant sold what appeared to be crack cocaine to an undercover state trooper in circumstances typical of a street level drug transaction. *See Wilkins,* 754 F.3d at 29 (defendant failed to show reasonable probability that he would have gone to trial had he known of Ms. Dookhan's misconduct when defendant sold drugs to undercover officer in transaction that mirrored prototypical street corner drug buy).

The Commonwealth's other case against the defendant was even stronger. A jury likely would have

lab" case, or, in the alternative, a second motion to withdraw his guilty plea. (C.A./196, 210). The Commonwealth opposes the defendant's pending motion.

As the AGO's Report pursuant to *Cotto* has demonstrated, Farak's misconduct at the Amherst drug lab predated the testing dates in the defendant's case in September 2009 as well as his plea in September 2010. Given that evidence as well as the Commonwealth's concession of a conclusive presumption of government misconduct for all cases in which Farak signed the certificate of analysis, the first prong of the *Ferrara-Scott* analysis has been met by the defendant.

The Commonwealth opposes the defendant's motion to withdraw his plea because it is unrealistic to believe that the defendant would have taken his chances and gone to trial rather than accepting the agreed sentence recommendation. *Scott, supra* at 355, citing *Clarke, supra* at 47 (defendant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances).

Before entering his pleas, the defendant faced a state prison sentence of five to fifteen years on each

case, which could have been imposed consecutively. *See* G.L. c.94C, §32A(d), as in effect in 2010. After pleading guilty, he received a reduced sentence of three to five years on each case, concurrent with each other, with 506 days credit for time incarcerated awaiting trial.

If the defendant had gone to trial, there was a substantial amount of direct and circumstantial evidence of his guilt. The charges against the defendant arose from two hand-to-hand transactions with an experienced undercover detective on two separate days. On July 31, 2009, Springfield Police Detective Julio Toledo, acting in an undercover capacity, approached Watt on Locust Street and asked him for a "twenty," which Detective Toledo described as "a commonly used street term that is used to describe $20.00 worth of crack cocaine." In exchange for $20.00 of pre-recorded buy money, the defendant handed the detective "two small, off-white, rock-like items that [Toledo] recognized from [his] training and experience to be consistent with crack cocaine." (C.A./222).

On August 18, 2009, Detective Toledo once again approached Watt and told him that he needed a "twenty." Watt told the detective to give the money to his girlfriend, Valerie. They walked to 17 Leyfred Terrace and waited across the street. Valerie returned with a plastic baggie containing a small, off-white, rock-like item that the detective recognized from his training and experience to be consistent with crack cocaine. Valerie removed the baggie from her mouth and gave it to the defendant who broke two small pieces off the rock and handed them to Detective Toledo. (C.A./224).

At a trial, Detective Toledo could have given detailed testimony about his training and experience as it related to the substances that he purchased from the defendant. *See Commonwealth v. MacDonald,* 459 Mass. 148, 162 (2011) (qualified narcotics expert permitted to offer an opinion). Given the facts and the expert testimony, the jury could draw their own conclusion about the defendant's guilt or innocence. *See Commonwealth v. Woods,* 419 Mass. 366, 375 (1995). "The circumstances of the sale to the undercover

officer and [Watt's] role in it comprised powerful circumstantial evidence." *Wilkins*, 754 F.3d at 29.

Finally, aside from Farak's misconduct, there is nothing to suggest that the defendant had a substantial ground of defense that he would have pursued at trial. For all the above reasons, the defendant's motion should be denied.

WHERE A DEFENDANT HAS DECLINED TO MOVE TO WITHDRAW THEIR PLEA OR FOR A NEW TRIAL DUE TO THE POSSIBILITY OF INCREASED CRIMINAL EXPOSURE, THE COMMONWEALTH AGREES THAT THE EXPOSURE CAP SET FORTH IN *BRIDGEMAN V. DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT*, 471 MASS. 465 (2015) SHOULD BE APPLIED TO ALL THE "SO CALLED" FARAK CASES

In *Bridgeman v. District Attorney for the Suffolk District*, 471 Mass. 465 (2015) *(Bridgeman I)*, the Supreme Judicial Court held that:

> In cases in which a defendant seeks to withdraw a guilty plea under Mass. R. Crim. P. 30(b) as a result of the revelation of Dookhan's misconduct, and where the motion is allowed, the defendant cannot (1) be charged with a more serious offense than that of which he or she initially was convicted under the terms of a plea agreement; and (2) if convicted again, cannot be given a more severe sentence that that which originally was imposed. In essence, a defendant's sentence is capped at what it was under the plea agreement.

Bridgeman, supra at 477, citing *Ferrara v. United States*, 372 F. Supp. 2d 108, 111 (D. Mass. 2005), *aff'd*, 456 F.3d 278 (1st Cir. 2006). Since the

defendants here, as well as all other cases in which Sonja Farak signed the certificate of drug analysis, are in the same position as those defendants whose certificates were signed by Dookhan, the same rule should be applied concerning resentencing.

Two of the defendants before the Court have yet to file motions to withdraw their pleas or for new trials because of the perceived threat of increased sentencing exposure without adoption of the "*Bridgeman* cap":

1. Omar Brown, 0579CR01159

Omar Brown was indicted by a Hampden County grand jury on November 21, 2005 on charges of possession of cocaine with intent to distribute as a second offense (count 1); trafficking in cocaine (14-28 grams) (count 2); possession of marijuana (count 3); resisting arrest (count 4); and violation of a drug free school or park zone (count 5). The defendant tendered a guilty plea on May 24, 2006 before the Honorable Tina S. Page who sentenced him on count 2 to MCI-Cedar Junction for a term of three years and one day. Counts 3 and 4 were placed on file and counts 1 and 5

were nol prossed by the Commonwealth. (C.A./226-227, 229).

Mr. Brown's case is distinguishable from the other cases before the Court. The certificates of analysis in the defendant's case were signed by Rebecca Pontes, not Farak, on November 7, 2005 (C.A./232, 233)[12], and the defendant is therefore not entitled to the presumption that egregious government misconduct occurred in his case. *See Resende, supra* at 14 (where Dookhan did not analyze the drugs, defendant not entitled to benefit of conclusive presumption). And although the defendant claims that the integrity of the Commonwealth's evidence in his case was impaired, he offers no support for that claim. *See Nelson, supra* at 596 (defendant required to demonstrate a connection between problems at the lab and his own case).

The defendant has not filed a motion to withdraw his plea or for a new trial. Instead, he relies on the claim that "triple-acting egregious prosecutorial misconduct" compels dismissal of his convictions. The

[12] The substances from the defendant's case were submitted to the MSP lab in Springfield for retesting. The January 20, 2017 report indicates that the substances contained cocaine and marijuana. (C.A./236).

Commonwealth opposes the defendant's motion to dismiss based on allegations of prosecutorial misconduct and as mentioned, *supra*, relies on and adopts the AGO's memorandum in opposition to the motion.

2. Lizardo Vega, 0979CR00097

Indictments were returned against Lizardo Vega on February 10, 2009 on charges of possession of heroin with intent to distribute, subsequent offense (count 1), distribution of heroin, subsequent offense (count 2), violation of a drug free school or park zone (count 3), possession of cocaine with intent to distribute, subsequent offense (count 4), and violation of a drug free school or park zone (count 5). On January 28, 2010, the defendant tendered a guilty plea on the lesser offenses of possession of heroin with intent to distribute (count 1), distribution of heroin (count 2), and possession of cocaine with intent to distribute (count 4). The Commonwealth nol prossed counts 3 and 5. The Honorable Constance M. Sweeney accepted the defendant's plea and sentenced him on counts 1 and 2 to concurrent terms of two and one-half years in the Hampden County House of Correction, 130 days direct

(time served) with the balance suspended for two years with probation conditions, followed by two years of probation on count 4. (C.A./238-239, 242).

The evidence in the defendant's case was submitted to the Amherst Drug Lab on January 29, 2009 and was analyzed on March 16, 2009. The certificates of analysis were signed by Farak. (C.A./248-250).[13]

Although in his prayer for relief the defendant asks that he be allowed to withdraw his plea, the defendant has yet to file a motion pursuant to Mass. R. Crim. P. 30(b). As to the defendant's motion to dismiss based on allegations of prosecutorial misconduct, the Commonwealth opposes the pending motion and relies on and adopts the AGO's memorandum in opposition to the motion.

NO MISCONDUCT SHOULD BE IMPUTED TO THE AMHERST LAB GENERALLY SINCE THERE IS NO EVIDENCE THAT TESTING RESULTS WERE UNRELIABLE EVEN THOUGH SECURITY WAS LAX AND DOCUMENTARY RECORDS SCARCE

The Amherst drug lab had only four employees during most of the time that Farak worked there. Two chemists, Farak and Pontes, did most of the testing. Hanchett had supervisory duties in addition to some

[13] The evidence in the defendant's case has been located by the Springfield Police Department and as of February 23, 2017, is being submitted to the MSP lab in Springfield for retesting.

testing of larger cases. Salem was the evidence officer who accepted samples from the various police departments, kept a record of the tested samples and the certificates of analysis. Because the office was so small, notice of repairs to machinery and discrepancies in weights were often conveyed by word of mouth rather than written documentation. (Tr. 12/08/16 at 48). Hanchett testified that he depended upon the trustworthiness of his experienced staff. Anne Kasmarek testified that the way the lab was run was due, in part, to its small size. (Tr. 12/016/16 at 91-92, 93).

Despite the lab's small size, the Department of Public Health (DPH) depended on the Amherst lab to be as productive as possible. The chemists at Amherst analyzed approximately 8600 cases in 2009. (Tr. 12/08/16 at 21). In addition, it was relied upon by the Hinton lab to help out with its caseload. Hanchett drove to Jamaica Plain on a regular basis to obtain samples from Hinton for the Amherst chemists to analyze. (Tr. 12/08/16 at 16).

Even though the Amherst lab was expected to be as productive as possible, it was subject to budgetary

restrictions as well as the supervisory disinterest of DPH. Budget constraints limited manpower at the lab, limited the availability of more modern equipment, and limited the purchase of primary standards for testing. The limited manpower constrained the chemists to perform testing without additional time to accomplish the documentation that was required for accreditation.

Basically, the lab had to do more with less. The equipment, although of an older variety, was sufficient to get the work done. And although much has been made of broken fume hoods, Hanchett testified that there was always one that was operational (Tr. 12/08/16 at 41, 122). Hanchett also testified that they performed close to the recommendations of the Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG), but for the documentation for which they had little time. (Tr. 12/08/56, 124-125).

Hanchett manufactured secondary standards because of the unavailability of money to purchase primary standards. He testified that creation of secondary standards had been common practice in the past and he had originally been guided by directions in a book produced by the Drug Enforcement Agency. (Tr.

12/08/16 at 130). Nancy Brooks from the MSP admitted that the practice was not uncommon in years past although it was no longer acceptable in an accredited lab. (Tr. 2/11/16 at 36-37).

According to the testimony of both Hanchett and Dr. Powers, the Commonwealth's expert witness, both of whom were experienced chemists (*see* Exhibits 75, 264), the use of secondary standards did not render the test results unreliable. (Tr. 12/15/16 at 149). Hanchett took leftovers from large trafficking cases to create his secondary standards. He purified the substances and ran them against a primary standard to ascertain their purity. Given that the standards were used against the unknown samples in both a preliminary test (GC) and a confirmatory test (GC-MS), any discrepancies would show up in the final result and be recognized by the chemist. (Tr. 12/08/16 at 66-69, 71, 83-85, 102-104, 128-130, 133-134, 146).

Similarly, although chemists at the Amherst lab did not run blanks between each sample, they agreed that if carryover occurred it would be identified by a chemist in the test results and thereafter corrected. (Tr. 12/8/16 at 209; Tr. 12/15/16 at 155).

The lab employees testified that they had never received any notice of any problems or complaints from any police department or from any assistant district attorney. Furthermore, after the Supreme Court decision in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009), the chemists provided discovery packets to the defendants which they could use to cross-examine the chemists about their test procedures and results.

The MSP took over administration of the Amherst lab on July 1, 2012.[14] On October 10, 2012, the MSP conducted a quality assurance audit of the lab to determine what steps were necessary to meet accreditation standards. (Tr. 12/08/16 at 126). The Amherst lab was not accredited which was not unusual -- even the MSP lab was not accredited until 2001. Regulations for forensic labs have evolved over time, with no single entity providing standardization.

The MSP audit team made certain negative findings which they documented in the Annual Technical Audit

[14] A safety site assessment by the MSP from 2012 compares the Amherst lab favorably with the Hinton lab. (C.A./252)

Worksheet.[15] Exhibit 1. Kathleen Morrison, a member of the audit team who testified in the hearings before Judge Kinder, said that the audit did not raise any questions about the reliability of the testing performed at the lab. (Tr. 9/09/13 at 37, 42, 85). It is important to note that the Amherst lab was not shut down at that time as the result of the Audit findings.[16] The lab was shut down only when it became a crime scene. The lab chemists were retained by the MSP and, although Hanchett retired, both Pontes and Salem continue to work for the MSP.

As the result of the 2013 evidentiary hearings on the Audit findings and the Amherst lab, Judge Kinder concluded that "while the negative findings in the October 2012 Quality Assurance Audit reflect a lax atmosphere in which left of controlled substances could go undetected for a period of time, the audit did not reveal any unreliable testing." Exhibit 185/ p. 6). No additional evidence has come to light to

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[15] Steps were taken at the lab to remediate the findings, such as the use of blanks after each sample and purchasing primary standards for testing.

[16] It is also important to note that subsequent testing by the MSP lab in the defendants' cases, has confirmed the earlier test results of the Amherst lab.

discredit Judge Kinder's ultimate findings about the Amherst drug lab.

CONCLUSION

The Commonwealth respectfully submits this memorandum on the issues surrounding the malfeasance of Sonja Farak at the Amherst drug lab and the motions filed by the individual defendants' Mass. R. Crim. P. 30(b) motions. The Commonwealth moves this Honorable Court to deny those motions to which the Commonwealth has objected for the reasons stated herein, and to deny those motions to dismiss on the basis of prosecutorial misconduct for the reasons stated in the Office of the Attorney General's memorandum and adopted by the Commonwealth.

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