COMMONWEALTH OF MASSACHUSETTS

SJC-12430.

SUFFOLK COUNTY.

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

JUSTINO ESCOBAR,
Appellant.

Reply Brief of Appellant,
Justino Escobar.

Respectfully submitted
for Justino Escobar,

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Argument in Reply[1]

The failure to investigate Ms. Farak's conduct at the Hinton laboratory.

The Commonwealth's appellate argument relies the proposition that the investigation of the Hinton laboratory was thorough despite the lack of any investigation directed toward determining whether the multi-year malfeasance of chemist Sonja Farak was ongoing during the time she worked with Ms. Dookhan at that laboratory.

In contrast, the defense argument relies upon the proposition that, because the Commonwealth has not investigated whether Ms. Farak, Ms. Saunders or other chemists engaged in conduct similar to that of Ms. Dookhan - with that failure being the result of the Inspector General's misleading stated conclusion that Ms. Dookhan had been the sole bad actor at that laboratory - the Commonwealth is in breach of its constitutional duties.

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[1] The Record Appendix will be cited as "R.A. [page number];" the Commonwealth's proposed supplemental appendix will be cited as "C.A. [page number];" the Commonwealth's brief will be cited as "Comm. Br. [page number];" Mr. Escobar's proposed supplemental appendix will be cited as "S.A. [page number];" and the transcript of the August 17, 2017, hearing will be cited as "Tr. 8-17-17/[page number]."

A thorough investigation of the Hinton laboratory could not but involved consideration as to whether Ms. Farak's malfeasance extended to the time she served with Ms. Dookhan at that facility. Nevertheless, the Commonwealth relies upon the tenuous proposition that there was no reason to investigate Ms. Farak's conduct or that of any other non-Dookhan Hinton chemist.

In reality, any minimally diligent investigator - particularly one conducting a searching and unflinching inquiry - could not but have considered the fact of Ms. Farak's malfeasance at the Amherst laboratory itself constituted a sufficient basis for inquiry as to whether she had engaged in similar conduct while at the Hinton laboratory. Here, in contrast, we have the spectacle of a law enforcement agency arguing to the effect that, while that a known malefactor's secretive malfeasance was ongoing in August, 2004, it could not possibly also have been underway in July, 2004.[2]

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[2] The Hampden Superior Court would conclude that "from 2004 until January 18, 2013, while working at the Amherst lab, Farak was, on almost a daily basis, under the influence of narcotics, and at other times was suffering the effects of withdrawal." R.A. 291. Ms. Farak had worked at the Hinton laboratory, with Ms. Dookhan, immediately before transferring to the Amherst laboratory. R.A. 281.

It would seem to be a short walk from the conclusion that Ms. Farak was using methamphetamine and comparable narcotics while testing drugs at the Hinton laboratory to the conclusion that there was a reasonable possibility that she was a bad actor at that laboratory. To solve that problem, the Commonwealth completely disregards Ms. Farak's use of methamphetamine while at the Hinton laboratory.

Instead, twice, the Commonwealth indicates that her use of that drug began while at the Amherst laboratory:

> It was only after she started in Amherst, sometime in late 2004 or early 2005, that she first tried the methamphetamine standard stored at the Amherst laboratory.

Comm. Br. 16.

> Importantly, as it pertains to the defendant's claim, it was only after her transfer to Amherst, sometime in late 2004 or early 2005, that she sampled the methamphetamine standard stored at the Amherst laboratory.

Comm. Br. 33.[3]

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[3] Rather than being important in any respect, it would seem self-evident that Ms. Farak's access to the laboratory standards at the Amherst facility would have been limited before her arrival at that laboratory. Similarly, neither Ms. Farak's use of laboratory standards at the Amherst laboratory, nor the timing of that use, is important to Mr. Escobar's claim.

What actually is important to the defense claim is the evident malfeasance of Ms. Farak at the Hinton laboratory. In contrast to both the Commonwealth's implication that Ms. Farak did not use methamphetamine until she arrived at the Amherst laboratory and the Commonwealth's disregard of the applicable Hampden Superior Court's findings,[4] such court found that Ms. Farak began her poly-substance intake - including her intake of methamphetamine - at the Hinton facility even before she began to test narcotics:

> From January of 2002 until May of 2003, Farak worked for DPH where she conducted testing to detect HIV. During that 16 month period, she continued and perhaps increased her consumption of alcohol and recreational drugs, including MDMA and marijuana, and she first tried methamphetamine.

R.A. 281.

Notably, when the Commonwealth made a similar argument *below*, the Suffolk Superior Court replied: "[e]xcept that's not quite from Superior Court Judge Carey's findings as defense points out appropriately, which is that Judge Carey seems to be saying that he was drawing an inference that Farak was already

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[4] The Commonwealth has provided this Court with chronologies of Ms. Farak's known drug intake - which chronologies leave out mention of her intake of methamphetamine while at the Hinton facility. Comm. Br. 16, 40.

addicted when she was at Hinton." Tr. 8-17-17, at 33-34. *Compare* the Commonwealth's assertion that Ms. Farak's merely used marijuana while at the Hinton laboratory, and its commentary that such drug laboratory chemist's unlawful drug use in that regard was not out of the ordinary - as though a drug laboratory's chemist's unlawful drug use could be ordinary. Comm. Br. 35-36.

Consistent with the Hampden Superior Court's conclusion that Ms. Farak was already addicted while testing narcotics at the Hinton laboratory, and in light of such court's conclusion that Ms. Farak's drug intake would impair "her ability to test and analyze controlled substances and to check the equipment and instruments used to analyze suspected drugs on occasions which cannot be identified," there was a reasonable possibility that she qualified as a bad actor while working at the Hinton laboratory. R.A. 291.

This Court has defined the relevant standard, holding that the duty to investigate obtains where Ms. Farak "may have compromised the evidence." *Commonwealth v. Cotto*, 471 Mass. 97, 112 (2015); *Commonwealth v Ware*, 471 Mass. 85, 95 (2015).

Consistent with the Hampden Superior Court's findings as to the compromise of the evidence consequent to Ms. Farak's testing while impaired, that standard was met relative to her work at the Hinton laboratory. R.A. 291.

With regard to Ms. Farak's testing while impaired, during her Grand Jury testimony she spoke of a day in 2012 on which she had consumed so much LSD at the Amherst laboratory that she did not believe she could drive home. C.A. 1074-76. When asked whether she had conducted any drug tests after ingesting that LSD - which she had done at lunchtime, Ms. Farak testified that she had not done so. C.A. 1074-75.

The Amherst laboratory's records, however, establish that, on the afternoon of the day in question, Ms. Farak had conducted drug tests. R.A. 191-92. Thus, while the secretive nature of Ms. Farak's malfeasance precluded verification of much of her account as to her conduct, where verification was possible, her Grand Jury testimony proved factually inaccurate. *Compare* Comm. Br. 33-35, in which the Commonwealth accepts all of Ms. Farak's testimony as being truthful.

That the Commonwealth failed to investigate Ms. Farak's conduct at the Hinton laboratory serves to establish that there was no investigation directed toward determining whether any chemist at that laboratory (besides Ms. Dookhan) engaged in malfeasance. That failure was entirely inconsistent with the Inspector General's stated conclusion that Ms. Dookhan had been the sole bad actor at the Hinton laboratory - the necessary implication of that stated conclusion was that the Inspector General had conducted an investigation in such regard and had determined that there had been no other bad actors. An analysis of the contents of the Inspector General's report, however, establishes that there was no such investigation.

The Commonwealth's argument in response to the defense contentions in that regard is relegated to a footnote in which it points out that the defense description of the Inspector General's report relies upon the headings for each section, and contends that doing so "fails" because such headings are not "exhaustive." Comm. Br. 45 n.5. The Commonwealth provides no examples of the sections being materially more extensive than the headings would indicate.

In contrast - and reality, sections such as that entitled "Lack of Accreditation" (R.A. 47-48) do not contain discussion both of lack of accreditation and of an investigation of Sonja Farak.[5] We can trust that, had some corner of the Inspector General's report contained a description of such an investigation, the Commonwealth would have included mention thereof in its brief.

With respect to the Commonwealth's suggestion that the Inspector General may have conducted an investigation relative to chemist Farak's conduct, yet simply did not mention such an inquiry in its report (Comm. Br. 45 n.5), given footnote 14 of the Inspector General's report (R.A. 38-39) - including the reference in that footnote to Ms. Farak as an "Amherst lab chemist," a far more reasonable conclusion would be that the Inspector General did not even realize Ms. Farak had ever worked at the Hinton laboratory.

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[5] In contrast to the Commonwealth's argument, Mr. Escobar does not contest the "substantive adequacy of the government's investigation" as to whether chemists besides Ms. Dookhan engaged in malfeasance at the Hinton laboratory. Comm. Br. at 23. Mr. Escobar does not claim that the Commonwealth conducted an inadequate investigation in that regard; rather, the claim is that the government did not investigate at all.

Reliance upon the Inspector General's stated conclusion that Ms. Dookhan had been the sole bad actor at the Hinton laboratory was misplaced.

The Commonwealth correctly notes that this Court relied upon the Inspector General's report. Comm. Br. 43. We all did - the reliance was universal.

For example, when the Department of Public Health was asked to provide information as to any investigation regarding Ms. Saunders, it replied:

> As you know, the investigation into the Hinton Drug Lab conducted by the Inspector General determined that the former Hinton Drug Lab Chemist, Annie Dookhan's [sic] acted independently and was "rogue." As such, I'm not familiar with any investigation into Ms. Saunders and my preliminary inquiry has not revealed any information to the contrary.

R.A. 169.

In that regard, the Suffolk Superior Court would find that the Inspector General's March 4, 2014, report "mentions chemist Saunders exactly twice."[6] R.A. 409 ("[a]s far as the court is aware, investigation of the Hinton lab essentially ended with the IG report, which mentions chemist Saunders exactly twice").

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[6] One such mention consisted, in its entirety, of a passing referenced to such chemist having worked in a particular room (R.A. 78); the other mention concerned a request by Ms. Saunders that she be made Ms. Dookhan's team leader (R.A. 52).

Another example concerns the Suffolk County District Attorney's Office, which - in response to a public records request, would state both that it had not conducted an investigation as to Ms. Saunders and that "[t]he investigation of the Hinton Lab was conducted by the Attorney General's Office,[7] the Office of the Inspector General, and the Governor's Office[8] (through their special counsel to the Department of Public Health)." R.A. 171.

Had there actually been an investigation directed toward the conduct of chemists besides Ms. Dookhan, it could have become evident that Ms. Saunders, Ms. Farak and Ms. Dookhan produced 52% of the reported test results during the seven months they worked together - despite the fact that ten other Hinton chemists were also reporting results. R.A. 157.

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[7] The Office of the Attorney General would state that it has no records of any investigation conducted to determine the extent to which Ms. Saunders may have impaired the integrity of the Commonwealth's evidence. R.A. 173. It may be presumed that, had the Attorney General's Office conducted such an investigation, it would have had records.

[8] Special Counsel Meier's report was incorporated into the November 16, 2015, Memorandum in Support of Mr. Escobar's Motion to Vacate and for the Sanction of Dismissal. Such report sought to identify all of the individuals who potentially could have been affected by Ms. Dookhan's conduct - and did not concern the conduct of chemists besides Ms. Dookhan.

In that regard, the Commonwealth argues that nothing could have been amiss then because it does not seem that Ms. Saunders reported numbers consistent with dry-labbing throughout her time at the Hinton laboratory. Comm. Br. 17-21, 39-41. In reality, whether Ms. Saunders was engaged in dry-labbing at later times would seem immaterial to whether she engaged in such misconduct while working with Ms. Farak and Ms. Dookhan.[9]

Regardless of whether Ms. Saunders engaged in malfeasance at other times, her extraordinarily high number of reported test results at certain times mandated inquiry. *See, generally, Commonwealth v. Scott*, 467 Mass. 336, 340 (2014) ("[a]ccording to the Hinton drug lab internal inquiry report, dated November 13, 2012 (Hinton internal inquiry), 'Dookhan's consistently high testing volumes should have been a clear indication that a more thorough analysis and review of her work was needed'").

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[9] During the investigation of Ms. Dookhan, investigators did speak with both Ms. Saunders and Ms. Farak. C.A. 243-44, 289-90. As was the case with each interview conducted during the investigation of Ms. Dookhan, the inquiry by those investigators was directed toward Ms. Dookhan's misconduct, not that of anyone else. C.A. 243-44, 289-90.

As to those numbers, the Suffolk Superior Court, which manifestly did not suffer any of the personal deficits attributed by the Commonwealth ("legal pareidolia" - Comm. Br. 36-37; "apophenia" - Comm. Br. 38; "failure of cognition" - Comm. Br. 39), would find the following:

> But first is her numbers. That's a fact, her very high numbers.

Tr. 8-17-17, at 28. *See also*, 8-17-17, at 29 ("it seems to me that Saunder's numbers, based on everything we know about how these labs work, raises a question in my mind").

Moreover - and with respect to context, during the investigation of Ms. Dookhan, another Hinton laboratory chemist would provide information as to the number of results a chemist could be expected to report:

> Lisa states that after Melendez Diaz, she found it hard to keep her numbers up. Prior to Melendez Diaz, Lisa advised that she would do approximately 100 samples a week on average, and a max of about 400 samples in a month, but that would be with no other responsibilities. After Melendez Diaz, which she believes was June 26, 2009, Lisa's samples lowered to 200 a month at the most.

C.A. 267.

In contrast to that information, during the seven months Ms. Dookhan, Ms. Farak and Ms. Saunders worked together, they reported a total of 14,535 results. R.A. 157. That number indicates that each of such chemists reported 692 results on average per month - with Ms. Farak, not Ms. Dookhan, reporting the most. R.A. 157.

Rather than a maximum of 400, Ms. Saunders would average 608 reported results during that time. R.A. 157.

The Commonwealth does not include reference to the Suffolk Superior Court's concern about Ms. Saunders' "very high numbers" in its brief; given that such chemists reported number of results were more than 50% higher than what could be expected, challenge to such finding of fact would not seem promising.

Particularly since Ms. Dookhan's malfeasance was accompanied by very high numbers of reported results, that Ms. Saunders also reported very high numbers of results triggered the Commonwealth's duty to investigate. *Cotto*, 471 Mass. at 112; *Ware*, 471 Mass. at 95. *See Scott*, 367 Mass. at 340.

This appeal is properly before this Court.

In *Commonwealth v. Ware*, this Court granted direct appellate review and addressed the circumstance wherein the Commonwealth had failed to conduct a comprehensive, adequate, or even reasonable investigation as to Ms. Farak's malfeasance at the Amherst laboratory. R.A. 341-42.[10] As a direct result of this Court's holding, where there had been injustice, there now stands Judge Carey's decision.

As here, in *Commonwealth v. Ware*, the defendant brought an appeal and sought direct appellate review during the pendency in Superior Court of a motion for a new trial. *Ware*, 471 Mass. at 90-91. As here, in the absence of investigation by the Commonwealth, Mr. Ware had sought to conduct post-conviction discovery as to the nature and extent of the malfeasance of chemist Sonja Farak. *Ware*, 471 Mass. at 91. Though there had been no final order on Mr. Ware's motion for new trial, this Court granted direct appellate review. *Ware*, 471 Mass. at 92. *See* R.A. 375, n.48.

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[10] The Hampden Superior Court found that "[t]here is no evidence that a comprehensive, adequate, or even reasonable investigation by any office or agent of the Commonwealth had been attempted, concluded or disclosed prior to the issuance of the Caldwell Report."

In doing so, this Court would make an exception to the general rule that "discovery orders are interlocutory and not appealable," and hold that:

> The circumstances in the present case, however, necessitate an exception to the established route for obtaining appellate review of an order denying postconviction discovery.

Ware, 471 Mass. at 92.

Mr. Escobar expressly relied upon the *Ware* precedent in his Application for Direct Appellate Review, and this Court granted review.

The Commonwealth's argument that this matter is not properly before this Court contains no mention of the applicable exception set forth in *Ware*. Comm. Br. 45-49.[11]

The Commonwealth does represent that Mr. Escobar's Motion for a New Trial is not properly before this Court. Comm. Br. 45-49. The short answer in that regard is that an appeal regarding that motion is not before the Court. *Compare* Comm. Br. 2.

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[11] Such argument also mentions nothing of the fact that the Commonwealth initially brought an appeal from the Suffolk Superior Court's discovery order. R.A. 413-14.

Mr. Escobar appealed from the Suffolk Superior Court's judgments of August 17, 2017 (R.A. 403), which concerned the Motion to Vacate and for the Sanction of Dismissal and the Motion for a *Cotto* Order. R.A. 401-02. The Suffolk Superior Court took no action as to the Motion for New Trial on that date. *See* R.A. 402.

Mr. Escobar's second Notice of Appeal did not concern the Motion for a New Trial; rather, it was limited to that part of the decision of August 25, 2017, "which constituted a denial of his request to conduct an investigation relative to chemist Saunders." R.A. 412.

As a result, the Commonwealth's argument that Mr. Escobar has improperly brought an appeal concerning his Motion for a New Trial has no merit.

Moreover, not only is the appeal concerning the post-conviction discovery motion in the same proper posture as that in *Ware*, but also the appeal as to the denial of the Motion to Vacate and for the Sanction of Dismissal is from a final order as to that motion. *Ware*, 471 Mass. at 92. *See, generally,* Comm. Br. 37 (*referring* to such motion as "fundamentally a motion for a new trial").

In addition, as of today, January 18, 2018, it has been five years since the discovery of Ms. Farak's malfeasance. R.A. 292. In those years, not only has the Commonwealth failed to investigate her conduct at the Hinton laboratory, but also there is no such investigation on the horizon. *Compare Bridgeman v. District Attorney for the Suffolk District* [*Bridgeman II*], 476 Mass. 298, 333-34 (2017) (Lenk, J., concurring, with whom Budd, J., joins) ("[r]ecognizing what Dr. Martin Luther King, Jr., once called "the fierce urgency of now," we must act swiftly and surely to staunch the damage and to make things as right as we can").

Also as of today, it is one year since this Court spoke in *Bridgeman II* of the constitutional requirement that the Commonwealth notify all affected defendants of the possibility that their convictions may be subject to vacatur because of the malfeasance of a drug laboratory chemist. *Bridgeman II*, 476 Mass. at 315. Though the Commonwealth recognizes that convictions grounded upon testing purportedly conducted by Ms. Farak are "toxic," the Commonwealth is taking no steps to meet its burden in that regard. Tr. 8-17-17/32.

In fact, the Commonwealth had taken a path which leads in the opposite direction from that specified in *Bridgeman II*. By agreeing to vacate convictions and then filling *nolle presequis* in cases which present serious argument to the effect that Ms. Farak engaged in dry-labbing at the Hinton laboratory and had access to that laboratory's drug standards, the Commonwealth has not only failed to provide notice, but also has successfully precluded further investigation in either such regard. S.A. 19, 32, 48, 49.

While precluding investigation of such matters as Ms. Farak's evident access to Hinton laboratory standards (S.A. 19), the Commonwealth continues to assert that Ms. Farak did not have access to the Hinton laboratory standards, with such assertion being grounded on nothing more credible that Ms. Farak's Grand Jury testimony. Comm. Br. 33-34 (which relies on C.A. 983). Accepting a malefactor's word as to the scope of its malfeasance does not constitute thorough investigation - particularly here, where, to the limited extent it can be verified, such testimony has been shown to be factually incorrect. *Contrast* C.A. 1074-76 with R.A. 191-92.

Given the fierce urgency of now, consideration of such matters by this Court at this time is advisable.

Conclusion

As referenced herein, despite the passage of years, the Commonwealth remains in breach of its duty to investigate. *Ware*, 471 Mass. at 95. Similarly, the Commonwealth remains in breach of its duty to learn and disclose. *Cotto*, 471 Mass. 112. In addition, the Commonwealth remains in breach of its duty to notify. *Bridgeman II*, 476 Mass. at 315.

Given such circumstance, dismissal has become appropriate.

Respectfully submitted
for Justino Escobar,

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS		Supreme Judicial Court SJC-12430.
COMMONWEALTH	)	
	)	CERTIFICATION OF
v.	)	COMPLIANCE.
	)	
JUSTINO ESCOBAR	)	

Now comes appellate counsel for Mr. Escobar and, pursuant to Mass. R. A. P. 16(k), respectfully certifies that the foregoing reply brief conforms to the Massachusetts Rule of Appellate Procedure, particularly Rules 16(a)(6), 16(e), 16(f), 16(h), 18 and 20.

Respectfully certified,
for Justino Escobar,

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