COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

ESSEX COUNTY NO. SJC-11408 & SJC-11409

COMMONWEALTH

V.

SHUBAR CHARLES

COMMONWEALTH

V.

HECTOR MILETTE

BRIEF OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE

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ISSUE PRESENTED

Whether a special magistrate appointed by the Chief Justice of the Superior Court pursuant to Mass. R. Crim. P. 47, or a judge of the Superior Court, has the authority to allow a defendant's motion to stay execution of his sentence, then being served, pending disposition of the defendant's motion for a new trial (Reported Question No. 1).

INTERESTS OF *AMICI CURIAE*

A. Committee for Public Counsel Services

The Committee for Public Counsel Services ("CPCS"), the sole Massachusetts public defender agency, has the statutory responsibility "to plan, oversee, and coordinate the delivery" of legal services to indigent persons eligible for appointed counsel, including those charged with crimes. G.L. c.211D, §1.

The issues in these cases concern the authority of the courts of this Commonwealth to respond to the legal crisis created by systemic malfeasance and incompetence at the William A. Hinton State Laboratory Institute. As the State's only public defender agency, CPCS is responsible for providing effective legal representation to the tens of thousands of poor persons whose

convictions are tainted. The conclusions drawn by the Court in the instant cases will impact the ability of CPCS's clients to obtain a timely and effective remedy for the violation by state actors of their basic right to a fair and reliable adjudication of the charges brought against them. See Patton v. United States, 281 U.S. 276, 304 (1930) ("Whatever rule is adopted affects not only the defendant, but all others similarly situated").

B. Massachusetts Association of Criminal Defense Lawyers

The Massachusetts Association of Criminal Defense Lawyers ("MACDL") is an incorporated association of more than one thousand experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters.

The fairness of thousands of drug prosecutions in Massachusetts has been called into question by the

shocking allegations of wrongdoing and mismanagement at the William A. Hinton State Laboratory Institute. The reverberations are as sweeping as they are devastating -- for the lives of persons wrongfully convicted, incarcerated, and deported on the basis of tainted evidence; and for the public resources spent on these cases before the Drug Lab's failures were revealed and now being expended in an effort to correct the injustices.

Questions reserved and reported in the Charles and Milette cases focus on the authority of Superior Court judges and special judicial magistrates to issue stays of execution of sentence while affected defendants seek justice. The ability to obtain stays in these circumstances is critical to stemming losses of liberty that cannot be undone. The Court thus has the opportunity to, and should, guarantee that defendants' motions for new trials in these cases will not be meaningless as a practical matter.

MACDL joins CPCS in this brief in support of the defendants Charles and Milette. MACDL agrees with the arguments presented in the defendants' brief that judges and magistrates have, or should be given by this Court, the authority to stay sentences for defendants affected by the drug-lab debacle who are seeking motions for new trials.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statements of the cases and facts contained in the brief of defendants Charles and Milette.

ARGUMENT

I.

DEPRIVING JUDGES AND SPECIAL JUDICIAL MAGISTRATES OF THE AUTHORITY TO STAY SENTENCES PENDING THE FILING AND RESOLUTION OF MOTIONS FOR A NEW TRIAL WOULD SIGNIFICANTLY UNDERMINE THE SYSTEM SET UP BY THE COURTS TO ADDRESS THE UNPRECEDENTED CRISIS CREATED BY THE WIDESPREAD MISCONDUCT OF AN AGENT OF THE COMMONWEALTH.

A. The drug lab crisis was caused by an agent of the Commonwealth.

Between 2003 and 2011, Annie Dookhan was employed as a chemist at the Forensic Drug Lab ("Drug Lab"), housed at the William A. Hinton State Laboratory Institute ("Hinton Lab"). In this position, Dookhan served as an "agent[] of the prosecution team" in tens of thousands of criminal prosecutions. Commonwealth v. Beal, 429 Mass. 530, 532 (1999). The Honorable John C. Cratsley, sitting as a special judicial magistrate, has recently described the evidence supporting his conclusion that Dookhan acted as an agent of the prosecution:

> . . . . Dookhan's role at the Drug Lab was to provide evidentiary support for the government's prosecution of alleged drug offenses. . . . That support

> included her expert scientific opinion as to the composition and weight of substances seized from defendants. . . . Certainly, she and her scientific findings were essential to the Commonwealth's proof of criminal behavior. As such, it cannot be denied that in September 2009 [when the analysis in the particular case in question was conducted] Dookhan was an agent of the government.

Commonwealth v. Baez-Franco, ESCR2009-1151 ("Proposed Findings and Order on Defendant's Motion to Withdraw Guilty Plea") (Essex Super. Ct. April 25, 2013) (Cratsley, S.J.M.) (reproduced in the Addendum to this brief at Add. 27).[1/] See also Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 318 n.23 (2010) (psychiatric examiner appointed by court at request of Commonwealth

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[1/]On April 29, 2013, the Commonwealth filed an "Objection" to Judge Cratsley's proposed findings and rulings in Baez-Franco (Add. 21). Pursuant to the two-step protocol being challenged by the Commonwealth in its petition before the Court on reservation and report in District Attorney for the Eastern District v. Superior Court, No. SJC-11410, the filing of such an objection effectively nullifies Judge Cratsley's action on Baez-Franco's new trial motion, which will now presumably be heard de novo by the Regional Administrative Justice of the Essex Superior Court. The same process is underway with respect to the defendant's new trial motion in Commonwealth v. Rodriguez, ESCR2007-0875, in which Judge Cratsley, on March 28, 2013, entered proposed findings and rulings recommending that the motion be allowed, the Commonwealth filed an objection on April 1, 2013, the matter was heard by Judge Lu de novo on April 19, 2013, and remains under advisement as of the filing of this brief.

is "an agent of the prosecution"); Commonwealth v. Liang, 434 Mass. 131, 136 (2001) (victim-witness advocate is "an agent of the prosecution"). See generally Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009) ("A forensic analyst responding to a request from a law enforcement official may feel pressure -- or have an incentive -- to alter the evidence in a manner favorable to the prosecution").

Proof of Dookhan's status as an agent of the Commonwealth may also be found in her e-mail correspondence with law enforcement personnel, which reveals a chemist who functioned not as an independent scientist but as an ends-justifies-the-means member of the prosecution team. For example, in an e-mail dated June 10, 2009, a federal prosecutor apologized to Dookhan for being "bothersome lately," explaining that "summer approaches and we need to take some of these guys off." Dookhan responded, "No problem. I have the same attitude. . . get them off the streets." SRA 312.[2/]

[2/]Excerpts from Dookhan's e-mail correspondence with law enforcement are set forth in the Affidavit of Anne Goldbach, ¶¶47-68, submitted in the single justice session in support of CPCS's motion to intervene in the Charles and Milette cases, and reproduced in the defendants' supplemental record appendix at SRA 299-323. Redacted copies of the e-mails themselves are reproduced as "Attachment B" to the Goldbach affidavit, Commonwealth v. Charles, No. SJ-2013-0066, paper no. 19.1 (filed March 13, 2013).

Dookhan has confessed to having engaged in extraordinary professional misconduct during her tenure at the Hinton Lab, which has destroyed the integrity of many thousands of criminal convictions. The discovery disclosed thus far reveals, among other things, that Dookhan prepared reports falsely claiming that she had conducted testing when no testing had in fact been performed; that she intentionally contaminated samples in order to manipulate test results; that she fabricated professional credentials, including while testifying under oath; and that she forged signatures of confirmatory chemists. SRA 247-248.

It is hard to overstate the disruption that has been caused by the misconduct at the Drug Lab. By the Department of Public Health's own estimate, Dookhan was directly involved in at least 34,000 Drug Lab cases. SRA 288 (Benedetti Affidavit at ¶7). To date, CPCS has appointed counsel in approximately 8,000 previously-adjudicated cases affected by the Hinton Lab scandal. SRA 297 (Benedetti Affidavit at ¶63). During the single-justice proceedings in this case, the Superior Court submitted an affidavit stating that the number of new-trial motions filed as a result the Drug Lab scandal may be as large as the total number of cases handled by

the entire Superior Court system over the course of an average year. SRA 270-271 (Affidavit of Maria Pena at ¶¶12-13, submitted in support of Commonwealth's petition for relief in District Attorney for the Eastern District v. Superior Court, No. SJ-2013-0092).

B. The relief the Commonwealth seeks would undermine the system set up by the courts to address the crisis caused by the Commonwealth's own agent.

In order to address this unprecedented crisis, the courts have established a sensible system for efficiently handling post-conviction challenges stemming from the Hinton Lab crisis. The Commonwealth now urges this Court to upend that system -- necessitated by the corrupt actions of its own agent -- by stripping special judicial magistrates, and even Superior Court judges, of the authority to grant stays of sentences to incarcerated defendants, even when those defendants have made strong showings that their convictions are invalid.

Amici concur with Charles's and Milette's argument that a judge or special judicial magistrate has the authority to stay the execution of a sentence where the defendant has established a reasonable likelihood of prevailing on the merits of a motion for a new trial,

whether or not such a motion has yet been filed. Rather than reiterating that argument here, amici will describe the practical effect -- on both the liberty interests of wrongly convicted defendants and on the efficient administration of the trial courts -- of holding that judges and special judicial magistrates lack the authority to grant such stays.

Stays have played an essential role in the trial courts' efforts to address the fallout from the Drug Lab crisis. Based on the information available to amici, it appears that (a) the great majority of Dookhan stay motions that have been heard (whether by a special judicial magistrate or by a judge) have been allowed, and (b) none of the few such motions that have been denied have been on grounds that the judge or special judicial magistrate lacked authority to consider the matter.

Stripping judges of the power to grant stays in these cases would cause two unacceptable problems. First, defendants whose convictions have been tainted would be placed in an untenable position. Earlier in this case, the single justice concluded that it was premature to consider whether malfeasance at the Drug Lab warranted a global rather than case-by-case

response, because the work of David Meier, Esq.[3/] and of the Inspector General[4/] is incomplete. SRA 237. Without the ability to obtain stays, defendants would be forced to choose between sitting in jail awaiting the release of the results of these investigations or insisting on immediate action on their new-trial motions without having the fruits of the official investigations or knowing whether this Court will ultimately conclude that systemic rather than case-by-case remedies are necessary.

Second, the work of the trial courts would be seriously disrupted without the authority to grant stays to deserving defendants. The courts of this Commonwealth were already working under the strain of large case loads and inadequate budgets before the Drug

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[3/] "Information provided by Meier at a meeting with Superior Court Chief Justice Rouse on February 28, 2013, indicates that prospects for the imminent production of information that would reliably identify all of the defendants whose cases were handled by Annie Dookhan are grim. . . . Meier reported at that meeting that his ongoing review of the paper files from the Hinton lab is not revealing sufficient data in most cases to identify defendants whose cases were handled by Dookhan."

SRA 297 (Benedetti Affidavit at ¶¶61-62).

[4/] Amici have been informed that the Inspector General's office expects its report to be completed by the end of this calendar year.

Lab crisis. On top of their normal workload, the courts must address challenges in thousands of previously-adjudicated cases stemming from misconduct at the Drug Lab. By granting stays in appropriate cases, the courts have sought to avoid squeezing large numbers of new post-conviction motions into their already-crowded calendars with enough promptness to avoid manifest injustice. Thus, stripping judges and special judicial magistrates of their authority to grant stays would create unnecessary and unacceptable disruption within the trial courts.

Moreover, the number of Drug Lab cases the courts will need to address may grow significantly over the coming months because the scope of the problems at the Drug Lab appears to extend well beyond Dookhan's personal misconduct. The Attorney General's office recently disclosed hundreds of photographs of the Drug Lab, revealing that the Lab was kept in a state of complete disarray: "[D]rug samples are shown stored all over the Hinton lab: in drawers, cabinets, even in manila folders inside file cabinets." Deborah Becker, "Photos Reveal Sloppy Conditions at Now-Closed Drug Lab," http://www.wbur.org/2013/04/02/drug-lab-photos-conditions (last visited April 28, 2013). One photo-graph shows a clear plastic bag containing an apparent

sample of suspected drugs taped inside a cabinet with the following words handwritten on the bag: "Found by garbage can in 361 by DJR on 4-20-07." SRA 346.

By asking this Court to deprive judges and special judicial magistrates of the authority to grant stays, the Commonwealth seeks to throw a wrench in the system that the courts have set up to deal with an unprecedented judicial crisis created by the Commonwealth's own agent. Given the enormous scope of this crisis, it is essential for the trial courts to have the authority and discretion to grant effective and efficient remedies to affected defendants. This authority must include the power to grant stays where appropriate.[5/]

[5/] Amici note with concern that the unhelpful case-by-case approach toward the resolution of tainted Drug Lab cases exemplified by the Commonwealth petitions now before the Court may be gathering momentum in other affected counties. "The District Attorney for Middlesex County has recently rescinded the laudable policy that had guided his office's initial response to the Hinton Lab fiasco of assenting to (most) new trial motions and filing a nol prosequi in those cases in which it could be confirmed through discovery of all of the necessary drug lab papers that suspected contraband had been tested by Annie Dookhan." SRA 297 (Benedetti Affidavit at ¶65). And the Suffolk County District Attorney's office has recently begun formally objecting to special judicial magistrates performing any act in any Dookhan case that could be characterized as "adjudicatory" (Add. 38-39).

II.

MOTIONS TO STAY SENTENCES BROUGHT IN PREVIOUSLY-ADJUDICATED CASES IN WHICH DOOKHAN WAS THE PRIMARY OR CONFIRMATORY CHEMIST SHOULD BE HELD TO PRESUMPTIVELY PRESENT A STAY-WORTHY ISSUE UNDER THE TWO-PRONGED STANDARD FOR EVALUATING SUCH MOTIONS PURSUANT TO THE RULES OF CRIMINAL AND APPELLATE PROCEDURE.

In its brief to this Court, the Essex County District Attorney's Office ("Essex") concedes that stay motions in affected drug-lab cases should be subject to the same familiar two-pronged test used to evaluate stay requests while a direct appeal is pending. Essex Brief in Commonwealth v. Charles, No. SJC-11408 at 34 ("Two factors govern the consideration of a motion for stay of execution of sentence pending appeal: 1) the security risk presented by the defendant . . . and 2) the likelihood of the success of his claims on appeal"), citing Commonwealth v. Hodge (No. 1), 380 Mass. 851, 855 (1980); Commonwealth v. Allen, 378 Mass. 489, 498 (1979); Commonwealth v. Levin, 7 Mass. App. Ct. 501, 505 (1979).

On the other hand, the Bristol County District Attorney's Office ("Bristol") argues in an amicus brief that this standard is "inappropriately low," and that a "substantially higher burden" is necessary. Brief of the Bristol County District Attorney as amicus curiae at 11, 12. Bristol is wrong. The Hodge-Allen-Levin standard should apply to affected drug-lab cases.

Essex, as opposed to Bristol, rightly acknowledges this, even though, for reasons explained by Charles and Milette in their brief, Essex is wrong that the standard was not satisfied in their cases.

The concerns that led this Court to adopt the two-pronged stay standard exist for defendants whose convictions have been tainted by the drug-lab crisis. As stated by the Appeals Court in Levin, that standard is "grounded in rudimentary notions of justice," and recognizes that the theoretical right to challenge one's conviction would, without the ability to obtain a stay, "be made nugatory in the case of a short sentence, and would be impaired in the case of a larger sentence." Levin, 7 Mass. App. Ct. at 512-513. "The conviction may be reversible, but the time spent in prison is not." Ibid. Especially in light of the recent reductions in mandatory minimum sentences for assorted drug offenses, see St. 2012, c.192, §§12-29 & 48, the need for defendants in affected drug-lab cases to obtain stays of their sentences before those sentences are fully served is particularly pressing.

As to convictions based on test results in which Dookhan was directly involved as either the primary or confirmatory chemist, there should be a presumption that such defendants have satisfied the "likelihood of

success" prong. That prong requires showing only "an issue which is worthy of presentation to [a motion judge], one which offers some reasonable possibility of a successful decision in the [motion for a new trial]." Hodge (No. 1), 380 Mass. at 855; Allen, 378 Mass. at 498; Levin, 7 Mass. App. Ct. at 504. In other words, the claim need only be meritorious and not frivolous. See Levin, 7 Mass. App. Ct. at 504-505, 507, 511.

A defendant whose drug conviction was obtained in whole or in part on the basis of the work product of a Commonwealth agent who subsequently admitted that she was deliberately falsifying alleged drug evidence at the time of the testing in question has a stay-worthy legal issue. This much at least is clear from Judge Cratsley's thoughtful proposed findings and order in Baez-Franco, whose recommendation that Baez-Franco's guilty plea be vacated turns on the finding that the undisputed evidence of Dookhan's misconduct "antedated" the defendant's decision to plead guilty plea (Add. 27). Those who are incarcerated because of this kind of tainted evidence should be presumed to have satisfied the first prong of the test for obtaining a stay. See Levin, 7 Mass. App. Ct. at 512 (where co-defendants granted stays by different judge, appealing defendants would have satisfied likelihood of success

prong "even if the showing were marginal, [because] equality in treatment of defendants similarly situated is desirable").

CONCLUSION

For the above-stated reasons, amici urge this Court to deny the Commonwealth's petitions and hold that a judge or special judicial magistrate has the authority to grant a stay of execution of sentence pending the filing and disposition of a motion for a new trial.

Respectfully submitted,

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May, 2013.

ADDENDUM

Commonwealth of Massachusetts
ESSEX SUPERIOR COURT
Case Summary
Criminal Docket

Commonwealth v Baez-Franco, Gustavo

Details for Docket: ESCR2009-01151

Case Information

Docket Number:	ESCR2009-01151	**Caption:**	Commonwealth v Baez-Franco, Gustavo
Entry Date:	09/11/2009	**Case Status:**	CtRm D - 4th Floor - 56 Federal St.
Status Date:	10/23/2012	**Session:**	Disp (post sentence -Drug Lab)
Lead Case:	NA	**Deadline Status:**	Active since
Trial Deadline:	10/26/2009	**Jury Trial:**	NO

Parties Involved

2 Parties Involved in Docket: ESCR2009-01151

Party Involved:		**Role:**	Defendant
Last Name:	Baez-Franco	**First Name:**	Gustavo
Address:	44 French Street	**Address:**	
City:	Methuen	**State:**	MA
Zip Code:	01844	**Zip Ext:**	
Telephone:			

Party Involved:		**Role:**	Plaintiff
Last Name:	Commonwealth	**First Name:**	
Address:		**Address:**	
City:		**State:**	
Zip Code:		**Zip Ext:**	
Telephone:			

Attorneys Involved

6 Attorneys Involved for Docket: ESCR2009-01151

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Fascimile:	978-749-9594	**Representing:**	Baez-Franco, Gustavo (Defendant)

Calendar Events

15 Calendar Events for Docket: ESCR2009-01151

No.	Event Date:	Event Time:	Calendar Event:	SES:	Event Status:
1	10/26/2009	09:00	Arraignment	1	Event held as scheduled
2	12/01/2009	09:00	Conference: Pre-Trial	1	Event held as scheduled
3	01/22/2010	08:00	Hearing: Filing of Motion to Suppress	1	Event held as scheduled
4	02/09/2010	08:00	Hearing: Plea Change	2	Event held as scheduled
5	02/09/2010	08:00	Hearing: Evidentiary-suppression	1	Event moved to another session
6	11/15/2012	09:30	Drug Lab: Hearing Stay Sentence	2	Event held as scheduled
7	12/17/2012	09:30	Drug Lab: Status	2	Event moved to another session
8	12/17/2012	10:00	Drug Lab: Status	4	Event held as scheduled
9	01/03/2013	10:00	Drug Lab: Status	4	Event held as scheduled
10	01/17/2013	10:00	Drug Lab: Status	4	Event held as scheduled
11	01/31/2013	10:00	Drug Lab: Hearing Motion for New Trial	4	Event rescheduled by court prior to date
12	02/12/2013	14:00	Drug Lab: Discovery Motions	4	Event held as scheduled
13	03/07/2013	10:00	Drug Lab: Status	4	Event held as scheduled
14	03/25/2013	10:00	Drug Lab: Hearing Motion for New Trial	4	Event held--(ACTIVE) under advisement
15	04/25/2013	10:00	Drug Lab: Hearing Motion for New Trial	4	Event not held--joint request

Full Docket Entries

70 Docket Entries for Docket: ESCR2009-01151

Entry Date:	Paper No:	Docket Entry:
09/11/2009	1	Indictment returned
10/26/2009		Deft arraigned before Court
10/26/2009	2	Appearance of Commonwealth's Atty: Kristen R Buxton
10/26/2009	3	Appearance of Deft's Atty: Neil F Faigel
10/26/2009		Deft waives reading of indictment
10/26/2009		RE Offense 1:Plea of not guilty
10/26/2009		RE Offense 2:Plea of not guilty
10/26/2009	4	Bail set: $75,000.00 Cash (Feeley, J.)
10/26/2009		Bail warning read
10/26/2009		Assigned to Track "B" see scheduling order
10/26/2009		Tracking deadlines Active since return date
10/26/2009	5	Case Tracking scheduling order (Timothy Feeley, Justice) mailed
10/26/2009	5	10/26/2009
01/22/2010	6	Faxed Motion to Suppress Evidence without a warrant Filed
02/09/2010		RE Offense 1:Guilty plea (lesser offense) (Poss. of Heroin with
02/09/2010		intent to Dist.)
02/09/2010		RE Offense 2:Guilty plea (lesser offense) (Traff. in cocaine +14
02/09/2010		grams)
02/09/2010	7	Waiver of defendants' rights
02/09/2010	8	Defendant sentenced to on indictment # ESCR2009-1151 001, Defendant
02/09/2010	8	sentenced to Five (5) years to Five (5) years and One (1) day
02/09/2010	8	committed to Massachusetts Correctional Institution, Cedar Junction.
02/09/2010	8	Defendant deemed to have 202 jail credit days. (Lowy, J.)
02/09/2010	9	Defendant sentenced to on indictment # ESCR2009-1151 002, Defendant
02/09/2010	9	sentenced to Three (3) years to Three (3) years and One (1) day
02/09/2010	9	committed to Massachusetts Correctional Institution, Cedar Junction
02/09/2010	9	concurrent with ESCR2009-1151 001. Defendant deemed to have 202 jail
02/09/2010	9	credit days. (Lowy, J.)
02/09/2010	10	Victim-witness/Mandatory Drug Assessment fee assessed: $90.00/$150.00
02/09/2010	10	(Lowy, J.)
02/09/2010	11	Sentence stayed until 2/19/2010 (Lowy, J.)
02/09/2010		ORDERED remanded to the custody of the Essex Correctional Facility
02/09/2010		(Middleton)
03/17/2010	12	Victim-witness fee ($90.00) paid as assessed
03/17/2010	13	Drug fee ($150.00) paid as assessed
11/08/2011	14	Appearance of Deft's Atty: Debra D DeWitt
12/30/2011	15	Deft files motion to vacate convictions.

05/30/2012	16	Affidavit of attorney Danilo J. Brack.
09/18/2012	17	Deft files motion to vacate.
09/25/2012	18	Appearance of Deft's Atty: John R Valerio
10/23/2012	19	Appearance of Deft's Atty: Debra D DeWitt
10/23/2012	20	Deft files motion for stay of execution of sentence.
11/08/2012	21	Attorney, John R Valerio's MOTION to withdraw as counsel of record
11/08/2012	21	for Gustavo Baez-Franco
11/15/2012		Appearance of Commonwealth's Atty: Ronald E DeRosa
11/15/2012		Appearance of Deft's Atty: Debra D DeWitt
11/15/2012	22	Commonwealth's Opposition to the Defendant's Motion to Stay Execution
11/15/2012	22	of Sentence Filed
11/15/2012		Hearing Held on Motion to Stay; Motion Allowed (Lowy, J.) (Motion #20)
11/15/2012	23	Bail set: $5000.00 Cash with conditions GPS, Curfew 10:00pm -6:00am -
11/15/2012	23	If Defendant makes bail the Defendant must report to Essex County
11/15/2012	23	Superior Court probation department within 24 hours for GPS and
11/15/2012	23	probation contract and Weekly probation reporting, GPS fee Waived if
11/15/2012	23	Indigent , Live with mother in Lawrence address must be provided to
11/15/2012	23	probation (David Lowy, Justice)
11/15/2012		Bail warning read
11/15/2012	24	Order on Stay of Execution of Sentence - Drug Lab
12/17/2012	25	Deft files motion to vacate guilty plea.
01/08/2013	26	Deft files Discovery Response with CD attached
01/25/2013	27	Deft files discovery.
02/05/2013	28	Affidavit of defendant.
03/07/2013	29	MOTION by Deft: to Compel Discovery or in the Alternative Impose
03/07/2013	29	Sanctions filed
03/25/2013	30	Memorandum in Support of Motion for New Trial filed by defendant
04/25/2013	31	Proposed Findings and Order on Defendant's Motion to Withdraw Guilty
04/25/2013	31	Plea (Cratsley, S.M.)
04/25/2013		MOTION (P#25) Proposed Findings and Order allowing this motion issued
04/25/2013		this date [Cratsley, S.M.). Copies mailed 4/25/2013
04/29/2013	32	Commonwealth's Objection to Special Magistrate's Ruling Allowing the
04/29/2013	32	Defendant's Motion for New Trial

Charges

2 Charges for Docket: ESCR2009-01151

No.	Charge Description:	Indictment:	Status:
1	HEROIN/MORPHINE/OPIUM, TRAFFICKING IN c94C s32E(c)		Guilty plea (lesser offense)
2	COCAINE, TRAFFICKING IN c94C s32E(b)		Guilty plea (lesser offense)

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

SUPERIOR COURT
CRIMINAL ACTION
NO. ESCR 2009-1151

COMMONWEALTH

vs.

GUSTAVO BAEZ-FRANCO

PROPOSED FINDINGS AND ORDER ON DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

INTRODUCTION

By motion filed on December 17, 2012, the defendant, Gustavo Baez-Franco ("the defendant" or "Baez-Franco"), moves to withdraw his guilty plea and seeks a new trial on one count of possession of heroin with intent to distribute and one count of trafficking in cocaine in an amount of fourteen grams or more. Baez-Franco challenges his guilty plea based on newly discovered evidence of Annie Dookhan's ("Dookhan") misconduct and alleged mismanagement at the Hinton Drug Laboratory in Jamaica Plain ("the Drug Lab"). The Commonwealth opposes the motion. After conducting a hearing on March 25, 2013 and receiving stipulated exhibits, I make the following Proposed Findings and Order allowing the defendant's motion.

BACKGROUND

The docket reflects that on July 23, 2009, a Grand Jury returned indictments against Baez-Franco for one count of trafficking in heroin in an amount of twenty-eight grams or more and one count of trafficking in cocaine in an amount of twenty-eight grams or more. (Dkt #1).

The police report submitted into the record reflects that on July 23, 2009, while conducting surveillance in an area reported as having heavy drug dealing activity, three Methuen

police detectives and one sergeant ("the police") in unmarked cruisers observed a Jeep following a Honda Accord. (Ex. 3 at 3-4). The police followed the two cars and saw the Honda stop and pull over to the side of the road, and the Jeep pull over along the driver's side of the Honda. (Ex. 3 at 4). The passenger of the Jeep, later identified as Kelly Sawyer ("Sawyer"), leaned out of the window and attempted to hand an item to the driver of the Honda, later identified as the defendant. (Ex. 3 at 4-5). The defendant had his arm out of the window but pulled it back and drove away when he saw the police approaching. (Ex. 3 at 5).

The Jeep continued to follow the Honda and the police followed both cars. (Ex. 3 at 5). The vehicles once again pulled next to each other at an intersection, and the driver of the Jeep, later identified as Nickolas Pratts ("Pratts") (Ex. 3 at 5-6), opened the driver's side window and attempted to hand an item to the defendant, who leaned toward the passenger window and appeared to toss an object back to Pratts. (Ex. 3 at 5). Upon noticing the police close behind him, the defendant sped off. (Ex. 3 at 5).

The police stopped the Jeep and retrieved a hypodermic needle from Pratts. (Ex. 3 at 5-6). Pratts told the police that he was attempting to buy five grams of heroin for $500 from the driver of the Honda, who had refused to give him drugs because he thought he was being followed. (Ex. 3 at 6). Pratts also told the police that he has been coming to this area once a week for the past few months to buy heroin and has purchased five grams of heroin several times from this same person. (Ex. 3 at 6). After searching and finding no drugs on them, the police released Pratts and Sawyer. (Ex. 3 at 6).

Shortly thereafter, the police stopped the Honda, removed the defendant from the car, and retrieved money and two cell phones from his possession. (Ex. 3 at 6-7). The officers also recovered several cut-open plastic bags containing a tan powder-like residue believed to be

heroin which were at the defendant's feet, a large amount of cash, and a plastic bag containing suspected heroin from a compartment under the center console. (Ex. 3 at 7). After arresting Baez-Franco and securing a search warrant for another suspected "hide" in the Honda, the officers opened the "hide" and recovered $3,543 in cash, a bottle containing ten baggies of suspected heroin, another sandwich bag with twenty plastic baggies also containing suspected heroin, and another plastic baggie containing four chunks of suspected cocaine encased in a material that appeared to be coffee grounds and three additional plastic bags. (Ex. 3 at 7-8).

The total weight of the suspected heroin before being brought to the Drug Lab was approximately thirty-eight grams, and the total weight of the cocaine was eighty-eight grams. (Ex. 3 at 8). Dookhan was the primary chemist who analyzed the alleged controlled substances for the heroin charge on September 24, 2009 and she certified that they were heroin on drug certificates numbers B09-11052 and B09-11053.[1] (Drug Certificates ## B09-11052, B09-11053). Dookhan also analyzed the substance for the cocaine charge on September 24, 2009 and certified that it was 74.85 grams of cocaine on drug certificate number B09-11051. (Drug Certificate # B09-11051).

On February 9, 2010, pursuant to a negotiated plea bargain with the Commonwealth, Baez-Franco pled guilty to the lesser offenses of one count of possession of heroin with intent to distribute and one count of trafficking in cocaine in an amount of fourteen grams or more. (Dkt. #6). The defendant received a sentence of five years to five years and one day with 202 days of jail credit for time served on the heroin charge. (Dkt. #6). For the cocaine charge, the defendant

[1] Drug certificate number B09-11052 identifies the substances contained in the twenty plastic bags as 24.90 grams of heroin. (Drug Certificate # B09-11052). Drug certificate number B09-11053 identifies the substances contained in the ten plastic bags as 9.64 grams of heroin. (Drug Certificate # B09-11053). Additionally, Dookhan was the sole signatory on drug certificate number B09-11054 reflecting that she had analyzed the residue contained in one plastic bag on September 17, 2009. (Drug Certificate # B09-11054). However, the certificate states that "the residue was not tested."

received a concurrent sentence of three years to three years and one day with 202 jail credit days. (Dkt. #6). As a result of the Baez-Franco's plea, the federal government lodged an immigration detainer against him. (Def.'s Mem. at 1).

This matter came before the Court (Lowy, J.) on November 15, 2012 for a hearing on the defendant's motion to stay the execution of his sentence which was allowed. (Dkt. #24). The defendant remains in custody due to his immigration detainer. (Def.'s Mem. at 1). Pursuant to the "power and authority to conduct hearings on post conviction motions . . . [,]" I held a hearing on the defendant's motion for a new trial on March 25, 2013. See Mass. R. Crim. P. 47; Order of Assignment, (Mass. Super. November 26, 2012) (Rouse, C.J.). Baez-Franco was present and assisted by a Spanish-speaking interpreter, stipulated exhibits were presented, and I heard both counsels' oral arguments on the merits of the motion. The defendant filed a memorandum of law and the Commonwealth rested on its oral argument given on March 25, 2013.

DISCUSSION

I. Motion for a New Trial Pursuant to Rule 30(b)

"A postconviction motion to withdraw a plea is treated as a motion for a new trial." Commonwealth v. Correa, 43 Mass. App. Ct. 714, 716 (1997) (citations omitted). A judge may grant such a motion if "'it appears that justice may not have been done.'" Commonwealth v. DeRosier, 56 Mass. App. Ct. 348, 353-354 (2002), quoting Mass. R. Crim. P 30(b), 378 Mass. 900 (1979). Moreover, "the judge's disposition of the motion will not be reversed for abuse of discretion unless it is manifestly unjust . . . . " Correa, 43 Mass. App. Ct. at 716 (citations omitted).

II. Special Magistrate's Authority

Pursuant to Mass. R. Crim. P. 47, "the Justices of the Superior Court may appoint special magistrates to preside over criminal proceedings in the Superior Court. Such special magistrates . . . have the powers to . . . make findings and report those findings and other issues to the presiding justice or Administrative Justice, and to perform such other duties as may be authorized by order of the Superior Court." Mass. R. Crim. P. 47. Pursuant to the rule, Chief Justice Barbara J. Rouse issued an Order of Assignment appointing me as a Special Judicial Magistrate to preside over criminal proceedings in connection with so-called Dookhan cases. Order of Assignment, (Mass. Super. November 26, 2012) (Rouse, C.J.). As a Special Magistrate, I have "the power and authority to conduct hearings on post conviction motions, to issue orders regarding discovery, and other matters . . . , to make proposed findings and rulings to the Regional Administrative Justice . . . [and to] perform such other duties as may be authorized by order of the Superior Court." Id. This current motion for a new trial constitutes a postconviction motion within the language of the Order of Assignment. Accordingly, I have the authority to make these proposed findings and rulings.

II. Voluntariness of Plea

Baez-Franco first argues that the Court should vacate his guilty plea because it was not intelligently and voluntarily made. Baez-Franco does not contend that he lacked an understanding of either the elements of the charges against him or the consequences of pleading guilty, or that the plea colloquy proceedings themselves were somehow infirm.[2] See generally Commonwealth v. Robbins, 431 Mass. 442, 449 (2000). Rather, he argues that his plea was based upon misinformation resulting from Dookhan's misconduct at the Drug Lab and contends that had he known about that misconduct, he would not have pled guilty.

[2] Neither party has submitted into evidence a transcript of the plea colloquy.

Where, as here, the defendant was "warned of the usual consequences of pleading guilty and the range of potential punishment for the offense before entering a guilty plea . . . ," Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006), a defendant seeking to set aside a guilty plea as involuntary must show that (1) the government or its agents committed some egregiously impermissible conduct that antedated the entry of the plea; and (2) the misconduct was material to the defendant's choice to plead guilty.[3] Id. In analyzing these elements, the Court considers "the totality of the circumstances surrounding the plea." Id. (citations omitted).

In applying the Ferrara analysis, I must first determine whether Dookhan is a government agent. According to the evidence submitted by stipulation in this hearing, Dookhan's role at the Drug Lab was to provide evidentiary support for the government's prosecution of alleged drug offenses. (See generally Ex. 1[9b].). That support included her expert scientific opinion as to the composition and weight of substances seized from defendants. (See generally, Ex. 1[9b].). Certainly, she and her scientific findings were essential to the Commonwealth's proof of criminal behavior. As such, it cannot be denied that in September 2009 Dookhan was an agent of the government.

Next, I must determine whether Dookhan's misconduct antedated the defendant's guilty plea and whether, once known, information about that misconduct would be material to any attorney advising the defendant whether to accept a guilty plea or to go to trial. Essential to this analysis are my conclusions with respect to Dookhan's activities at the Drug Lab in September of 2009, when she reported her findings as the primary chemist named on drug certificates numbers B09-11051, B09-11052 and B09-11053.

[3] The court adopts the test in Ferrara, as it best addresses the defendant's argument.

First of all, there is direct evidence in the record that Dookhan's misconduct was occurring as early as 2008. In both her State Police interview and her signed statement, Dookhan admitted to "dry labbing" drug tests for two to three years prior to her removal from her lab duties in June 2011. (Ex. 1[6] par. 10; Ex. 1[6c] par. 2). This statement of Dookhan constitutes an admission to improper drug testing practices and procedures dating back to 2008.[4] In addition, Kate Corbett's Grand Jury Testimony that Dookhan tested "way more" than the average chemist in the Drug Lab (Ex. 2[9d]: Tr. Commonwealth v. Doe, Nov. 19, 2012 at 8-9), and Peter Piro's statement in his State Police interview that he became suspicious of Dookhan's high volume of work in 2007 or 2008 (Ex. 1[8n] par. 1) further corroborate Dookhan's admissions. There is also evidence that Dookhan's unusually high level of productivity continued well beyond 2008 (see Ex. 1[8g] par. 4-5) and eventually led to an audit of her work in 2010 (Ex. 1[8p] par. 5).

Of equal significance, there is evidence that Dookhan lied about her credentials in court cases and provided false testimony in court cases as far back as May of 2009. (See e.g., Ex. 2[9d]: Tr., Commonwealth v. Pineda, May 18, 2009 at 1-32; Ex. 2[9e]: Tr., Commonwealth v. Charlton, Aug. 10, 2009 at 168; Ex. 1[9b]: Tr., Commonwealth v. Hood, Aug. 13, 2009 at 129; Ex. 2[9e]: Tr., Commonwealth v. Flowers, Oct. 30, 2009 at 72. See also Ex. 1[9b]: Grand Jury Minutes, Commonwealth v. Doe, Oct. 25, 2012 at 4-11; Ex. 2[9d]: Grand Jury Minutes, Commonwealth v. Doe, Nov. 29 2012 at 5-18. See also Ex. 2[9g] at 3-9; Ex. 1[9b]: Tr., Commonwealth v. Blue, Aug. 10, 2010 at 2-147; Ex. 1[8n]: Follow-up Interview, Piro at 2.).

In her interview with the State Police and in her written statement, Dookhan admitted that she took and tested samples from the evidence safe against proper procedure (Ex. 1[6] pars. 2-3;

[4] Related to Dookhan's admission to "dry labbing" is her admission to intentionally contaminating samples that she had "dry labbed" when they were returned to her by the confirmatory chemist. (See Ex. 1[6] par. 9; Ex. 1[6c] par. 2).

Ex. 1[6c] par. 2.), and that she forged dates, initials, and entries on documents (Ex. 1[6] pars. 3-4; Ex. 1[6c] par. 2; Ex. 2 at 12. See also Ex. 1[9c]: Grand Jury Minutes, Commonwealth v. Doe, Nov. 8, 2012 at 12; Ex. 2[9d] Grand Jury Minutes, Commonwealth v. Doe, Nov. 19, 2012 at 7, 11.). In addition, she admitted to recording false data on Quality Control GC/MS Daily Injector Reports (Ex. 1[6] par. 5; Ex. 1[6o] par. 13; 1[8n] par. 5). Finally, Dookhan admitted that she intentionally contaminated samples that had previously tested negative for drugs in order to make them test positive. (Ex. 1[6] par. 9; Ex. 1[6c] par. 2). In fact, the record reflects that substances that Dookhan had certified as containing controlled substances subsequently tested negative for controlled substances. (See Ex. 2[9f]).

In my opinion, all of this information submitted in the record for this hearing, with particular respect to "dry labbing," allows me to make a finding that Dookhan's misconduct was actually occurring in 2009 and thus likely, more probably than not, occurring on September 24, 2009 when she was the primary chemist signing the drug certificates for the prosecution of the defendant.[5] The evidence also allows me to find that Dookhan had lied about her credentials and/or provided false testimony in at least four court cases at the time Baez-Franco entered his plea on February 9, 2010.

Furthermore, the Commonwealth's argument regarding the defendant's failure to produce certain control cards and control sheets, like the ones Daniel Renczkowski testified about in the Grand Jury Minutes in Commonwealth v. John Doe on November 8, 2012, misses the point of Dookhan's admission to extensive "dry labbing". In my opinion, the Commonwealth overstates the importance of these documents, especially given the fact that Dookhan has admitted to "dry labbing" back to 2008. Although control sheets and control cards can sometimes reflect that a

[5] While the other forms of Dookhan's misconduct during 2009 – 2011, described supra p. 7-8 arguably relate to that specific timeframe, the impact of these misdeeds on her overall credibility and the accuracy of her work is apparent.

sample was returned to the primary chemist, they do not necessarily indicate that the primary chemist "dry labbed" test results or even that the primary chemist's test results turned out to be different than those of the secondary chemist. (See Ex. 1[9c] at 31-32.). In fact, according to the Grand Jury testimony of Daniel Renczkowski and Kate Corbett, it was not unusual for a secondary chemist to return weak samples to the primary chemist. (See Ex. 1[9b]; Ex. 2[9d], Grand Jury Minutes, Corbett at 16). Accordingly, the defendant's failure to obtain the control cards and control sheets in his lab file does not alter my finding that Dookhan's misconduct was actually occurring in September 2009 and thus likely occurring on September 24, 2009.

It is clear that a defendant is not entitled to change his guilty plea simply because he miscalculated the strength of the case against him. See Brady v. United States, 397 U.S. 742, 757 (1970). However, when that miscalculation is the result of "some particularly pernicious form of impermissible conduct[,] . . . due process concerns are implicated." Ferrara, 456 F.3d at 291. I find that Dookhan's malfeasance at the Drug Lab, while different from the malfeasance that occurred in Ferrara,[6] constitutes precisely the sort of "egregiously impermissible misconduct" that is sufficient to implicate due process concerns and satisfy the requirements in Ferrara.

In analyzing whether this information about Dookhan's misconduct is material to the defendant's choice to plead guilty, a court "considers whether a reasonable defendant standing in the [defendant's] shoes would likely have altered his decision to plead guilty . . . " had he known about the misconduct. See Ferrara, 456 F.3d at 293. Here, one of the many relevant factors in making such a determination is whether the information about Dookhan's misconduct "would have influenced counsel's recommendation as to the desirability of accepting a plea bargain."

[6] In Ferrara, the Government knew, but failed to disclose to the defendant that a witness had recanted his grand jury testimony that inculpated the defendant. See Ferrara, 456 F.3d at 285-286.

Ferrara, 456 F.3d at 294 (citation omitted). I make the finding that the information about Dookhan's misconduct, including my finding that her misconduct actually occurred in 2009 and thus likely occurred on September 24, 2009, is material and relevant to any attorney advising Baez-Franco as to how to proceed.

Likewise, I find that this information about Dookhan's misconduct would have been material and relevant to Baez-Franco's attorney before and on February 9, 2010 when he counseled the defendant about whether to plead guilty. I also find that this information would have been essential to Baez-Franco's decision, made in consultation with his attorney, whether to accept a plea bargain and, if so, for which crime. Information indicating that Dookhan was likely dry labbing or otherwise improperly performing drug tests when she was the primary chemist named on the relevant drug certificates would have called into doubt the composition and weight of the substance at issue. As such, I find that that this information certainly would have been material to Baez-Franco's choice to accept a guilty plea, as the information would have further "detracted from the factual basis . . . support[ing] his plea." Ferrara, 456 F.3d at 293. The absence of affidavits from the defendant and his counsel does not alter my findings, given that the dates of the defendant's drug certificates (September 24, 2009) and his plea (February 9, 2010) fall squarely within the time period of 2009-2011, when much of Dookhan's documented wrongdoing occurred. Thus, I find that Dookhan's admitted conduct from 2009 to 2011, given the testing date for this defendant of September 24, 2009, outweighs any need for affidavits of counsel or the defendant in this particular case.

At oral argument, the Commonwealth contended that the Court should deny the defendant's motion outright based on the strength of the Commonwealth's evidence independent of the drug certificates. Essentially, the Commonwealth argues that this information about

Dookhan's misconduct would not have been material to the defendant's decision to plead guilty given the other evidence against him. This argument is unpersuasive.

Although "[p]roof that a substance is a particular drug . . . may be made by circumstantial evidence," Commonwealth v. Dawson, 399 Mass. 465, 467 (1987) (citations omitted), the circumstantial evidence that exists here does not provide such proof. The seizure of cash in an amount consistent with drug proceeds and the fact that the substances seized from the defendant's automobile were packaged in a manner consistent with drug distribution arguably tie Baez-Franco to drug dealing, but do not establish the chemical composition of the charged substance. See Vasquez, 456 Mass. at 366-367 (substantial amount of cash and paraphernalia associated with drug distribution did not establish substance was cocaine); Dawson, 399 Mass. at 467 (appearance, size, and shape of substance do not establish its chemical composition); Commonwealth v. Perez, 76 Mass. App. Ct. 439, 444 n.4 (unlikely that form of packaging is necessarily proof that substance is particular drug). In addition, Pratts' statement to the police that he had previously purchased heroin from the defendant and was attempting to do so again does not establish that any of the substances seized from the defendant were heroin. This is especially true, given (1) the fact that the police found no substances in Pratts' possession and (2) Pratt's statement to the police that the defendant had refused to give him any drugs. Cf. Commonwealth v. Mendes, 463 Mass. 353, 361 (2012) (statements of experienced drug user about personal drug use can establish credibility for identifying substances *in his possession*).

Moreover, in the defendant's case no field tests were conducted. Furthermore, the defendant did not admit prior to his plea that the substances seized from him were heroin and cocaine. Indeed, in some circumstances, even field test results and admissions, which do not exist here, might be insufficient to establish the chemical composition of a substance. See

Commonwealth v. Fernandez, 458 Mass. 137, 151 n.20 (2010) (noting that no Massachusetts case has accepted as reliable field test results, regardless of purpose for which they are offered); Commonwealth v. Burrell, 82 Mass. App. Ct. 1106 (2012), 2012 LEXIS 882 at *5 (Mass. App. Ct. 2012) (unpublished opinion pursuant to Rule 1:28), rev. denied by 463 Mass. 1110 (2012) (defendant's in-court admission that he had previously used cocaine and that substance found on his person was cocaine intended for personal use failed to establish identity of substance). Accordingly, the Commonwealth's evidence independent of the drug certificates does not alter my finding that the information about Dookhan's misconduct would have been material to the defendant's decision to plead guilty.

Another relevant factor in determining whether the information about Dookhan's misconduct would have been material to the defendant's choice to plead guilty is whether the value of that information was outweighed by the benefit of pleading guilty. See Ferrara, 456 F.3d at 294. There is no doubt that Baez-Franco received some benefit by pleading guilty. Before pleading guilty, he faced a state prison sentence of seven to twenty years for the heroin charge, see G. L. c. 94C, § 32E(c) as in effect in 2010; and five to twenty years on the cocaine charge. See G. L. c. 94C, § 32E(b) as in effect in 2010. After pleading guilty, he received a reduced sentence of five years to five years and a day with 202 days of jail credit for the heroin charge (Dkt. #8), and a concurrent sentence of three years to three years and one day with 202 days of jail credit for the cocaine charge (Dkt. #9).

Given the significant disparity among the various "staircased" mandatory penalties for trafficking in heroin and cocaine, as well as the immigration consequences of convictions for drug-related offenses, I find that the defendant and his counsel should have had the information about Dookhan's misconduct to inform them as to what kind of plea bargain to seek and/or

accept or whether to reject a plea bargain and go to trial. Where that information may well cast doubt on the Commonwealth's ability to meet its burden of proving the composition of the substances beyond a reasonable doubt, it can hardly be said that the value of such information was outweighed by the reduced sentence that the defendant received in exchange for his guilty plea.

Finally, this information about Dookhan's misconduct was and remains critical, following this decision, to the defendant and his counsel in making an informed decision as to whether to proceed to trial and challenge Dookhan's overall credibility, as well as her analysis on the drug certificates, by confronting her on the witness stand pursuant to Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). Alternatively, should Dookhan be found unavailable at any future new trial, the new information concerning her misconduct and how it implicated the workings at the Drug Lab remains equally important for the defendant's counsel in deciding whether to challenge the Commonwealth's "non-Dookhan" evidence regarding the composition of the alleged drugs.

For all these reasons and resting upon the analysis found herein, I find that this defendant did not make a knowing and voluntary guilty plea on February 9, 2010.

B. Newly Discovered Evidence

Baez-Franco also argues that Dookhan's misconduct at the Drug Lab is newly discovered exculpatory evidence and urges this court to vacate his guilty plea on that basis. "A defendant seeking a new trial on the ground of newly discovered evidence must establish . . . that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." Commonwealth v. Grace, 397 Mass. 303, 305 (1986) (citation omitted). Evidence is "newly

discovered" if it was "unknown to the defendant or his counsel and not reasonably discoverable by them at the time of [the defendant's plea]." Id. at 306.

There is no evidence in the record before me that either the defendant or his attorney knew of Dookhan's misconduct or its extent at the time of the defendant's plea on February 9, 2010. Nor is there any evidence that the defendant or his attorney could have discovered Dookhan's misconduct prior to entering his plea. As such, evidence of Dookhan's misconduct qualifies as "newly discovered."

The only issue for this analysis that remains is whether this newly discovered evidence casts doubt on the justice of Baez-Franco's convictions. To constitute an appropriate basis for a new trial, newly discovered evidence "not only must be material and credible . . . but also must carry a measure of strength in support of the defendant's position." Grace, 397 Mass. at 305 (citations omitted). Newly discovered evidence is material if it is "weighty and of such nature as to its credibility, potency, and pertinency to fundamental issues in the case as to be worthy of careful consideration." Commonwealth v. Brown, 378 Mass. 165, 171 (1979) (citation omitted).

As previously indicated, I find that this newly discovered evidence, had it come to light at the time, would have had a significant impact on the defendant's decision to plead guilty. Although evidence of Dookhan's misconduct could certainly have been used to impeach her credibility, particularly the evidence that she had falsely testified in at least four court cases prior to the defendant's plea, it can hardly be said that this evidence as a whole is merely impeaching. My finding that Dookhan actually dry labbed drug tests in 2009 and likely did so on September 24, 2009 when she tested the substances in Baez-Franco's case, along with my finding of Dookhan's many years of excessive productivity in issuing test results, raise serious doubts about the accuracy of the defendant's drug certificate which Dookhan signed as the primary chemist.

A drug certificate "assure[s] the fact finder, to a degree that virtually no amount of circumstantial evidence can, that the charged substance is in fact a particular illegal drug." Vasquez, 456 Mass. at 363-364. Here, the record submitted at this hearing shows that no other testing of the substance occurred. Thus, evidence of Dookhan's misconduct at the Drug Lab in 2009 has seriously undermined what is traditionally considered the Commonwealth's strongest evidence as to the composition and weight of the substance. I find that knowing about this newly discovered evidence would have enabled the defendant and his counsel to make an informed decision whether to challenge the accuracy of the drug certificates and impeach Dookhan's credibility at trial. I also find that, at the very least, it would have allowed the defendant to seek a better plea bargain. As stated previously, I find that Dookhan's admitted misconduct from 2009 to 2011, given the testing date for this defendant of September 24, 2009, outweighs any need for affidavits of counsel or the defendant in this particular case.

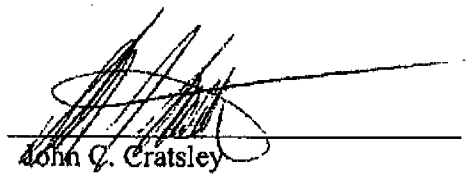
Accordingly, my ultimate finding is that this newly discovered evidence casts doubt on the justice of the defendant's convictions.

Therefore, I recommend that the defendant's motion for a new trial be allowed.

PROPOSED ORDER

For the foregoing reasons, my proposed Findings and Order are that the defendant's motion for a new trial be **ALLOWED**.[7]

[7] Pursuant to the Order of Assignment from Chief Justice Rouse, dated November 26, 2012, "If any party objects to the findings or rulings of the Special Judicial Magistrate, it must notify the Special Judicial Magistrate, opposing counsel and the Regional Administrative Justice in writing within 48 hours after receipt of the proposed findings and rulings stating the grounds for the objection."



John C. Cratsley
Special Judicial Magistrate

Date: April 25, 2013

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
DOCKET SUCR2009-10103

COMMONWEALTH

v.

Taqui Tajgaardan

COMMONWEALTH'S OBJECTION TO ADJUDICATORY PROCEEDINGS BEFORE THE SPECIAL JUDICIAL MAGISTRATES

The Commonwealth hereby submits its objection to the appointed special judicial magistrate hearing the instant substantive motion. The powers of special magistrates are defined by Rule 47. A special magistrate may "[] preside at arraignments, [] set bail, [] assign counsel, [] supervise pretrial conferences, [] mark-up pretrial motions for hearing, [] make findings and report those findings and other issues to the presiding justice or Administrative Justice, and [] perform such other duties as may be authorized by order of the Superior Court." MASS. R. CRIM. P. 47. Presuming that the powers as outlined in Rule 47 are themselves in conformity with the limits placed upon the judiciary by the Massachusetts Declaration of Rights, the additional powers granted to the special magistrates by Judge Rouse's order of assignment far exceed those outlined by the rule.

Adjudicatory decisions, such as a motion for new trial or a motion for stay of execution of sentence, in order to be binding, must be made by a judge and cannot be delegated. *See* Mass. Dec. Rights, Part the First, Article XXIX. A judge cannot be appointed by another member of the judiciary, as that power is granted to the governor

upon the advice and consent of his counsel, Mass. Dec. Rights, Part the Second, Chapter II, §1, Article IX, and cannot be usurped by any other branch of government. Mass Dec. Rights, Part the First, Article XXX. In any event, as of now, the special magistrates would be ineligible to serve as judges even if they were appointed by the governor anew. Mass. Dec. Rights, Part the Second, Chapter III, Article I (as Amended by Amendments, Art. XCVIII). Accordingly, when a special magistrate makes an adjudicatory decision he or she does so in contravention of the provisions of the Massachusetts Declaration of Rights—even the decision of whether or not to hold an evidentiary hearing is fundamentally an adjudicatory decision as it requires a special magistrate to determine whether or not the defendant has raised a substantial issue in his pleadings. *Commonwealth v. Gordon*, 82 Mass. App. Ct. 389 (2012). For these reasons the Commonwealth objects to this matter proceeding before a special judicial magistrate and asks that its objection be marked for identification and entered into the record.

RESPECTFULLY SUBMITTED
FOR THE COMMONWEALTH

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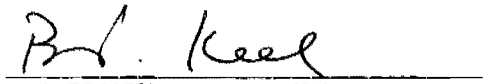
CERTIFICATE OF COMPLIANCE

I, Benjamin H. Keehn, certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).



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