

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Appeals Court No. 2017-P-1287.

SUFFOLK COUNTY.

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

JUSTINO ESCOBAR,
Appellant.

**Application of Appellant,
Justino Escobar,
for Direct Appellate Review.**

Respectfully submitted
for Justino Escobar,

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**Application of Appellant,
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1. Request for Direct Appellate Review.

Pursuant to Appellate Rule 11 of the Massachusetts Rules of Appellate Procedure, Appellant Justino Escobar respectfully requests that this Honorable Court kindly grant direct appellate review of the denial of his motion to vacate and for the sanction of dismissal, as well as the denials of both his motion for a Cotto order and his motion for leave to conduct post-conviction discovery. Mr. Escobar respectfully submits that this case presents questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

2. Statement of Prior Proceedings.¹

On January 27, 2009, a Suffolk County Grand Jury returned an indictment charging Mr. Escobar with Trafficking in Cocaine, over 200 grams. R.A. 4, 14. On December 3, 2009, pursuant to a plea agreement with the Commonwealth, Mr. Escobar entered a plea of guilty to so much of the indictment as charged Trafficking in Cocaine, over 14 grams, and the Commonwealth entered a partial nolle prosequi to the balance of the indictment. R.A. 6, 15. Mr. Escobar was sentenced to a term of 8 to 12 years imprisonment. R.A. 6.

On July 20, 2015, Mr. Escobar filed both a Motion for a New Trial and a Motion for Leave to Conduct Post-Conviction Discovery. R.A. 7. On August 6, 2015, Mr. Escobar submitted correspondence to the court requesting a hearing on the Motion for Leave to Conduct Post-Conviction Discovery. R.A. 163. On August 11, 2015, the Superior Court (Locke, RAJ) ordered the Commonwealth "to file a response or opposition within (60) sixty days." R.A. 8.

¹ The Record Appendix will be cited as "R.A. [page number];" the transcript of the August 17, 2017, hearing will be cited as "Tr. 8-17-17/[page number];" the transcript of the December 3, 2009, hearing concerning Mr. Escobar's change of plea will be cited as "Tr. 12-3-09/[page number];" and the Addendum will be cited as "Add. [page number]."

Following the expiration of those sixty days - and with no opposition or response being filed by the Commonwealth, on October 14, 2015, Mr. Escobar submitted correspondence to the court again requesting a hearing on the Motion for Leave to Conduct Post-Conviction Discovery. R.A. 164. On November 3, 2015, with there being still no response by the Commonwealth to the Superior Court's Order of August 11, 2015, Mr. Escobar submitted correspondence to the court requesting that his Motion for New Trial be allowed as unopposed. R.A. 165.

On November 16, 2015, Mr. Escobar filed a Motion to Vacate and for the Sanction of Dismissal (the motion to dismiss). R.A. 167. On November 23, 2015, the Superior Court (Locke, RAJ) ordered the Commonwealth "to file a response or opposition" to the motion to dismiss within 30 days or the "motion for new trial shall be deemed 'unopposed.'" R.A. 8. On November 25, 2015, the Commonwealth filed an assented-to motion for an additional thirty days in which to respond to Mr. Escobar's Motion for Leave to Conduct Post-Conviction Discovery. R.A. 8-9. On November 30, 2015, such motion was "allowed with assent of defendant" (Locke, RAJ). R.A. 9.

On February 10, 2016, with there being still no compliance by the Commonwealth with the Superior Court orders of August 11, 2015, and (despite the additional time) November 23, 2015, Mr. Escobar submitted correspondence to the court which included a request that the court consider allowing the July 20, 2015, Motion for Leave to Conduct Post-Conviction Discovery. R.A. 175. On February 16, 2016, with there still being no compliance by the Commonwealth with the foregoing Superior Court orders, Mr. Escobar submitted correspondence to the court requesting that his Motion for New Trial be allowed as unopposed. R.A. 176.

On April 18, 2016, with there still being no compliance by the Commonwealth with the foregoing Superior Court orders, Mr. Escobar filed a Motion for Enforcement of this Court's Order [of November 23, 2015]. R.A. 10.

On May 25, 2016, Mr. Escobar filed a Supplemental Memorandum in Support of Unopposed Motions. R.A. 10. On that day, the Commonwealth filed an Opposition to the Defendant's Motions for New Trial and for Post-Conviction Discovery. R.A. 10. Mr. Escobar would file a Memorandum in Reply to the Commonwealth's Opposition on June 8, 2016. R.A. 10.

On June 28, 2016, the Superior Court (Roach, RAJ) stayed proceedings pending this Court's decision in *Bridgeman v. District Attorney for Suffolk County* [*Bridgeman II*]. R.A. 10. Following the issuance of this Court's decision in *Bridgeman II*, on February 10, 2017, Mr. Escobar filed Defendant's Memorandum Regarding *Bridgeman II* (R.A. 10) and requested a hearing on his Motion for Leave to Conduct Post-Conviction Discovery.

On May 11, 2017, Mr. Escobar filed a Memorandum Regarding the Commonwealth's Violation of Its Duties to Investigate and Learn (R.A. 10) and requested a hearing on his Motion for Leave to Conduct Post-Conviction Discovery. On May 23, 2017, the Superior Court (Roach, RAJ) denied Mr. Escobar's request for a hearing without prejudice, and noted that the court was not hearing *Bridgeman* cases absent a specific motion explaining how the case "fits into the *Bridgeman* protocol and why it is ripe for review." R.A. 11. On June 1, 2017, Mr. Escobar filed such a motion. R.A. 11.

On June 6, 2017, Mr. Escobar filed a Motion for a Cotto Order (R.A. 264), and requested that such motion be scheduled for a hearing together with the Motion

for Leave to Conduct Post-Conviction Discovery.² Mr. Escobar filed supplemental memoranda in support of his Motion for a *Cotto* Order on June 9, 2017, and July 3, 2017. R.A. 11.

On June 16, 2017, the Superior Court (Roach, RAJ) denied Mr. Escobar's Motion for a Hearing, without prejudice. R.A. 11. The court would subsequently conduct a hearing, doing so on August 17, 2017. Tr. 8-17-17/1. That hearing concerned the Motion for a New Trial; the Motion for Leave to Conduct Post-Conviction Discovery; the motion to dismiss; and the Motion for a *Cotto* Order. R.A. 12-13.

² The motion for a *Cotto* Order sought an order similar to that issued by this Court in *Commonwealth v. Cotto*, 471 Mass. 97, 115 (2015), where, following consideration of the Commonwealth's failure to investigate Ms. Farak's conduct at the Amherst laboratory, the Court ordered the following:

It is imperative 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, which has serious implications for the entire criminal justice system. Within one month of the issuance of this opinion, the Commonwealth shall notify the judge below whether it intends to undertake such an investigation. If so, the investigation shall begin promptly and shall be completed in an expeditious manner.

Cotto, 471 Mass. at 115.

The court (Roach, RAJ) would thereafter deny the Motion for a Cotto Order and the motion to dismiss. R.A. 401-02. On August 21, 2017, Mr. Escobar filed a Notice of Appeal in such regard. R.A. 403.

On August 25, 2017, the court (Roach, RAJ) allowed the Motion for Leave to Conduct Post-Conviction Discovery, in part (requiring the disclosure of some materials concerning chemist Della Saunders), but denied such part of that motion as would have provided for an investigation. R.A. 404. On September 22, 2017, Mr. Escobar filed a Notice of Appeal in such regard. R.A. 412. On September 25, 2017, the Commonwealth filed a Notice of Appeal. R.A. 413.

On October 5, 2017, Mr. Escobar moved to consolidate the appeals that allowed those Notices of Appeal. The Appeals Court allowed such consolidation on October 13, 2017. Mr. Escobar filed his brief and record appendix in the Appeals Court on October 13, 2017. Upon joint motion of the parties, on October 18, 2017, the Appeals Court dismissed the Commonwealth's appeal.

3. Facts Relevant to the Appeal.

Drug laboratory chemist Sonja Farak engaged in three known forms of malfeasance: systematic theft of narcotics, tampering with her co-worker's evidence, and testing while impaired. R.A. 291. There has been no investigation directed toward identifying the extent to which any such form impaired the integrity of the evidence relative to the Hinton laboratory.

In proceedings that stemmed from Ms. Farak's impairment of the integrity of the Commonwealth's evidence at its Amherst laboratory, Hampden Superior Court Judge Richard J. Carey conducted hearings regarding prosecutorial misconduct related to the Commonwealth's willful failure to disclose exculpatory evidence and to its failure to investigate the extent to Ms. Farak's malfeasance at that laboratory. R.A. 273.

That court made findings consistent with Ms. Farak having engaged in at least one form of malfeasance relative to Hinton laboratory evidence.

With respect to Ms. Farak's work at the Hinton facility and as found by the Hampden Superior Court,

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. 281.³

As the Hampden Superior Court further found,

In August of 2004, Farak transferred to the Amherst lab. By early 2005, she was stealing and consuming methamphetamine standards from the lab every morning. Between 2005-2009, that consumption grew to several times per day. I credit her testimony that, aside from a few days or a week of sobriety during that four year period, she was under the influence of methamphetamine (and, at times, other controlled substances) at the lab nearly every day, all day and that when she did not take methamphetamine, she experienced severe lethargy, irritability, and the inability to focus and be productive, to the point where she would call in sick from work.

R.A. 281-82.

³ As a direct result of the Commonwealth's failure to undertake an investigation as to Ms. Farak's conduct at the Hinton laboratory, none of the thousands who relied upon the HIV test results such chemist reported (including crime victims) know those results may be unreliable. Compare the statutory rights of victims recognized by G.L. c. 258B, §§ 3(e) and (u) of the Massachusetts Victim Bill of Rights. Add. 63, 66.

There is no indication whatsoever that Ms. Farak changed her path from the time she engaged in poly-substance intake while conducting HIV testing to the time she engaged in poly-substance intake at the Amherst laboratory (Ms. Farak tested alleged narcotic samples at the Hinton laboratory between those two times). The Hampden Superior Court found that "precisely when Farak began stealing and consuming police-submitted samples at the Amherst lab, the full panoply of drugs she took and used, and the extent to which she was impaired at work, all remain unknown."

R.A. 282 n.15.

The Hampden Superior Court also found that, in 2010, the notes of one of Ms. Farak's care providers included mention that, "when abusing stimulants, she has had perceptual disturbances in the past, including paranoia and auditory hallucinations." R.A. 284.

In light of the foregoing, 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.

As noted, in 2004, Ms. Farak had worked at the Hinton laboratory - testing alleged narcotics - immediately before transferring to the Amherst laboratory.

Moreover, as found by the Hampden Superior Court, as a result of her poly-substance intake, "[i]n 2010, Farak performed all of her lab work while under the influence of narcotics." R.A. 284.

Ms. Farak's poly-substance intake worsened further in 2011. As found by the Hampden Superior Court:

In 2011, Farak's use of cocaine ramped up, as she used lab standards, police-submitted power cocaine, and she began to smoke rocks of cocaine. The latter practice quickly led to her becoming very heavily addicted.

R.A. 285.

As to the effect of Ms. Farak's poly-substance intake on the reliability of her reported test results, the Hampden Superior Court would conclude that "Farak's drug use impaired 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." R.A. 291.

Thus, Ms. Farak's poly-substance drug intake at work rendered her test results unreliable.

Notably, throughout the time that Ms. Farak worked at the Amherst laboratory, she tested Hinton laboratory samples. R.A. 398-400. There has been no investigation as to the extent to which Ms. Farak impaired the integrity of the Commonwealth's evidence in that regard.

Given that Ms. Farak evidently engaged in much the same course of conduct - particularly poly-substance intake - at both the Hinton and Amherst laboratories, it would seem that she readily qualified as a second bad actor of the Hinton laboratory. Such conclusion would apply both to the time at which she worked at the Hinton laboratory and to the time at which she worked at the Amherst laboratory and tested samples from the Hinton laboratory.

Following its investigation as to the Hinton laboratory, the Inspector General would announce the conclusion that Annie Dookhan had been the sole bad actor at such facility. There was universal reliance throughout the Commonwealth on that stated conclusion.

R.A. 170-74.

Remarkably, the Inspector General does not seem to have realized that Ms. Farak had worked at the Hinton laboratory. Footnote 14 of page 10 of the Inspector General's March 4, 2014, report references the criminal charges brought against Ms. Farak concerning her malfeasance at the Amherst laboratory, but mentions nothing of such chemist having worked at the Hinton laboratory. R.A. 38-39.

Nowhere in such footnote - or in that report - is there any consideration as to the effect of any form of Ms. Farak's malfeasance on the integrity of the evidence at the Hinton laboratory (Ms. Farak is not mentioned anywhere else in the Inspector Generals March 4, 2014, report, and is not mentioned at all in the February 2, 2016, supplement to that report). R.A. 21-149, 233-63.

Moreover, neither such report contains any indication that the Inspector General realized that Ms. Farak continued to test Hinton laboratory samples after her move to the Amherst laboratory.

As discussed elsewhere in this application, Mr. Escobar would suggest that the Inspector General's stated conclusion as to Ms. Dookhan having been the sole bad actor at the Hinton laboratory was unrelated

to such official's investigation and - as evidenced by the substance of the relevant report, and despite that stated conclusion - the Inspector General's investigation had not actually been directed towards determining whether any of the other chemists at the Hinton laboratory had functioned as bad actors.

Since Ms. Dookhan's dry-labbing malfeasance was characterized by her report of extraordinarily high number of test results, a thorough investigation as to whether any other chemists at the Hinton laboratory also qualified as bad actors would have involved consideration of the number of results reported by other chemists. Ms. Saunders reported the second highest number of test results - second only to Ms. Dookhan - in each year from 2005 through 2009. R.A 157-60. In 2007, Ms. Saunders nearly reported more test results (6,188) than did Ms. Dookhan (6,302). R.A. 159. Remarkably, in the time Ms. Farak, Ms. Dookhan and Ms. Saunders worked together (the first seven months of 2004), Ms. Farak would report 5,847 results, Ms. Dookhan would report 4,427 results, and Ms. Saunders would report 4,260 results. R.A 157.

In that time, Ms. Farak and Ms. Dookhan would together report 10,274 results - which was 37% of the 27,677 total number of results reported at the Hinton laboratory. R.A. 157.

Also during that time, Ms. Saunders, Ms. Farak and Ms. Dookhan would together report 14,535 results - which was 52% of the total number of results reported at the Hinton laboratory. R.A. 157. Notwithstanding the foregoing, the Inspector General does not seem to have realized that Ms. Farak had worked at the Hinton laboratory.

There has been universal reliance on the Inspector General's stated conclusion as to Ms. Dookhan having been the sole bad actor at the Hinton laboratory, and such reliance upon the proposition that such stated conclusion was related to the preceding investigation. Such reliance was misplaced.

4. Statement of the Issues of Law.

As a result of the Commonwealth's failure to investigate the conduct of chemists besides Ms. Dookhan at the Hinton laboratory, thousands of defendants do not know their convictions are subject to reversal.

Such result was entirely foreseeable at the time the Inspector General set forth the above-discussed conclusion. In light of the foregoing, the question arises as to whether, in its exercise of its superintendence power, this Court should repeat its holdings as to the need for an investigation in such matters, or should it order dismissal?

Correspondingly, the question before the Court would concern whether the Superior Court committed an abuse of discretion in its denial of the motion to dismiss, and the other two motions. In the foregoing regard, all relevant issues have been preserved for appeal. In essence, Mr. Escobar brought motions concerning each such matter - the motion to dismiss, the motion for a *Cotto Order*, and the motion for leave to conduct post-conviction discovery. The Suffolk Superior Court (Roach RAJ) would deny the first two such motions, and that part of the third which concerned conducting an investigation. R.A.401-02, 404-11.

Mr. Escobar filed timely Notices of Appeal following those decisions (R.A. 403, 412), and the ensuing appeals have been consolidated into the instant matter.

5. Argument.

I. Granting direct appellate review in *Commonwealth v. Ware* enabled this Court to exercise its supervisory power to create a remedy for the Commonwealth's unconstitutional failure to investigate the conduct of chemist Sonja Farak at the Amherst laboratory; granting direct appellate review in this matter would enable this Court to again exercise that power to create a remedy for the Commonwealth's unconstitutional failure to investigate the conduct of chemist Farak - or any other potential bad actor (besides chemist Dookhan) - at the Hinton laboratory.

After personnel at the Amherst drug lab notified the State police in January, 2013, that chemist Sonja Farak may have compromised the evidence in two drug cases, the Commonwealth conducted an investigation that could not be considered comprehensive, adequate, or even reasonable. See *Commonwealth v. Ware*, 471 Mass. 85, 95 (2015) ("[w]hen personnel at the Amherst drug lab notified the State police in January, 2013, that Farak may have compromised the evidence in two drug cases, the Commonwealth had a duty to conduct a thorough investigation to determine the nature and extent of her misconduct, and its effect both on pending cases and on cases in which defendants already had been convicted of crimes involving controlled substances that Farak had analyzed"). Contrast the Hampden Superior Court finding 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."⁴ R.A. 341-42. Such failure to investigate was a result of egregious prosecutorial misconduct by the Commonwealth's lead prosecutor, the intent of which was, as found by the Hampden Superior Court, "to conceal the extent of underlying misconduct by another government actor, Farak." R.A. 347.⁵

Recognizing the failure to investigate Ms. Farak's conduct at the Amherst laboratory, in 2014,

⁴ The April 1, 2016, "Investigative Report Pursuant to Commonwealth v. Cotto, 471 Mass. 97 (2015)," is referenced throughout Mr. Escobar's pleadings as the "Cotto Report." Such report was produced Assistant Attorney General Thomas A. Caldwell, and is referred to by the Hampden Superior Court as the "Caldwell Report." Out of deference to that court, such report is referred to as the "Caldwell Report" in this document.

⁵ In that regard, as found by the Hampden Superior Court, the direct supervisor of the Commonwealth's lead prosecutor (now-former Assistant Attorney General Anne Kaczmarek) had responsibilities which "required him to delegate the Farak prosecution to Kaczmarek and trust that the appropriate investigations were being conducted." R.A. 306. See also the court's finding at R.A. 312 ("Kaczmarek was accorded significant deference in leading the Farak prosecution. She had the trust of her superiors and she circumscribed the scope of Ballou's investigation into Farak's misconduct").

Bryant Ware brought a motion for leave to conduct post-conviction discovery. *Ware*, 471 Mass. at 90-91_.

After that motion was denied,⁶ Mr. Ware applied for direct appellate review. *Ware*, 471 Mass. at 92.

This Honorable Court granted such review, and exercised its superintendence powers to create a remedy concerning the Commonwealth's failure to investigate. *Ware*, 471 Mass. 92-93; *Cotto*, 471 Mass. at 112-15.⁷

In its subsequent decision, this Court could not have been more clear as to the duty of the Commonwealth to conduct a thorough investigation. See *Ware*, 471 Mass. at 95 (quoted above). In addition, in the companion case - *Commonwealth v. Cotto* - this Court elaborated as to the relevant constitutional obligation of Commonwealth: ("[t]he Commonwealth's obligation to conduct an investigation is premised on a prosecutor's 'duty to learn of and disclose to a defendant any exculpatory evidence that is 'held by

⁶ At the time of that denial, the Commonwealth's agent was still holding critical exculpatory evidence undisclosed. R.A. 332-33.

⁷ This court subsequently granted such leave in *Commonwealth v. Cotto*, and such matters were heard together (In DAR-22497, Mr. Ware had requested that action in his matter be deferred to provide for that possibility).

agents of the prosecution team,'' who include chemists working in State drug laboratories") *Cotto*, 471 Mass. at 112 (quoting *Ware*, 471 Mass. at 95, quoting *Commonwealth v. Beal*, 429 Mass. 530, 532 (1999)). As a result of that holding, the Commonwealth would conduct the Caldwell Investigation and then, more significantly, the Hampden Superior Court (Carey, J.) conducted a comprehensive hearing relative to both Ms. Farak's impairment of the integrity of the Commonwealth's evidence and the egregious prosecutorial misconduct of Assistant Attorney Generals. R.A. 179, 273.

To this point - and despite the passage of years (and even the passage of years since this Court's teachings in *Ware* and *Cotto*), the Commonwealth has not conducted an investigation that could be considered comprehensive, adequate, or even reasonable as to Ms. Farak's conduct relative to the Hinton laboratory. In that regard, Ms. Farak tested thousands of samples while working as a chemist at the Hinton laboratory, and tested a great many Hinton laboratory samples while she worked at the Amherst laboratory.

Through multi-year malfeasance, Ms. Farak's malfeasance impaired the integrity of the evidence of

both the Amherst and Hinton laboratories.⁸ Most unfortunately, since there has been no investigation as to her conduct at the Hinton laboratory, thousands of the defendants concerned do not know their convictions are subject to reversal.

Moreover, there has been no investigation directed towards whether any other chemists at that laboratory engaged in conduct similar to that of Ms. Dookhan. A thorough investigation in that regard would have considered whether the fact that the chemist who tested the materials attributed to Mr. Escobar, Della Saunders, reported numbers of results comparable to those of Ms. Dookhan (whose number of reported results was inflated by her dry-labbing malfeasance) indicated that she had engaged in comparable conduct.

Granting direct appellate review in the Ware matter led to the development of a remedy of the constitutional breach caused by the failure to investigate Ms. Farak's conduct at the Amherst laboratory - culminating in the comprehensive hearing

⁸ Chemist Dookhan's malfeasance was characterized by her extraordinarily high number of reported results; during the time that Ms. Farak worked with such chemist, Ms. Farak reported substantially more results than did Ms. Dookhan. R.A. 157.

in Hampden Superior Court; granting direct appellate review in this matter could lead to a remedy of the ongoing breach of the constitutional rights of thousands to exculpatory evidence caused by the failure to investigate Ms. Farak's conduct or that of any other bad actor at the Hinton laboratory.

B. The Commonwealth's failure to investigate was the foreseeable result of the Inspector General's issuance of a report which featured the misleading conclusion that Ms. Dookhan had been the sole bad actor at the Hinton laboratory. Granting direct appellate review would enable this Court to construct a remedy in that regard.

The Inspector General's March 4, 2014, report both detailed the investigation conducted and set forth the conclusion Ms. Dookhan had been the "sole bad actor" at the Hinton laboratory. R.A 141. The Inspector General issued a press release with that report that served to emphasize such stated conclusion. R.A. 150.

Necessarily implicit in that stated conclusion was the premise the Inspector General's investigation had been directed toward determining whether there had been bad actors at work at the Hinton laboratory besides Ms. Dookhan, and had found none.

Foreseeably, there was universal reliance upon that premise. The prominence given to that stated conclusion in both the March 4, 2014, report and the accompanying press release establishes that such reliance was invited. R.A. 150.

The substance of the report belies that stated conclusion - which conclusion was unrelated to the investigation described in the report. Specifically, the report described inquiry into deficiencies at the Hinton laboratory, from lack of adequate training, to insufficient funding, to inconsistent testing practices. No such inquiry supported the conclusion that Ms. Dookhan had been the sole bad actor at the Hinton laboratory; no matter how in depth, consideration of matters such as the lack of protocols at that laboratory could not reasonably lead to the conclusion that only Ms. Dookhan engaged in malfeasance while there.

The Inspector General wrote that "the OIG found no evidence that any other chemist at the Drug Lab committed any malfeasance with respect to testing evidence or knowingly aided Dookhan in committed her malfeasance." R.A. 142. That the Inspector General found no such evidence - including no evidence

relative to Ms. Farak - may be seen as a result of its having not looked for any. In effect, the Commonwealth was required to investigate the extent to which its evidence had been impaired by any such actors, not simply report what it might have happened upon while looking into something else.

Had there actually been an investigation as to whether any chemists besides Ms. Dookhan had functioned as bad actors, the Inspector General undoubtedly would have described it in his report - and, in every probability, would have considered whether the malfeasance of Ms. Farak - which had already led to indictments relative to the Amherst laboratory (R.A. 38-39) - had been ongoing at the Hinton laboratory. No such investigation was described, and the Inspector General does not seem to have even realized that Ms. Farak had worked at the Hinton laboratory. R.A. 38-39.

As a result of the foregoing, thousands do not know their convictions are subject to dismissal; the grant of direct appellate review would allow for the exercise of this Court's superintendence powers to create a remedy.

The number of appellate matters concerning the failure to investigate Ms. Farak's conduct at the Hinton laboratory may be limited by the Commonwealth's ongoing practice of vacating some of the relevant convictions, and then filing *nolle prosequi*s as to the underlying charges. For example, speaking of the cases in which the integrity of the evidence was impaired by Ms. Farak while at the Amherst laboratory, the Commonwealth noted in this matter that "[t]hose are toxic, and if someone brings me a Sonja Farak Amherst drug certificate on a Suffolk County case, at least in Suffolk County speaking for what we're doing here, because our numbers are relatively low, that person will assent to a motion to vacate and will get a *nolle pros.*" Tr. 8-17-17/32.

In doing so, the Commonwealth would seem to both acknowledge the existence of matters in which convictions should be dismissed and to make clear that it will do nothing to provide information to those concerned. In *Bridgeman II*, this Court could not have been more clear; those in that circumstance must be notified and informed - waiting for them to appear in court is constitutionally unacceptable. See, e.g., *Bridgeman II*, 476 Mass. at 315 ("[a]s applied here,

prosecutors had a responsibility timely and effectively to disclose Dookhan's misconduct to all affected defendants because Dookhan might erroneously have found substances that were not controlled substances to be a controlled substance, or to be a certain weight, creating the risk that a defendant may have been found guilty of a drug crime he or she did not commit"). Despite that teaching by this Court, there has been no such notice to those who need be informed and no investigation as to who would need to be informed (and filing *nolle prosequis* as cases appear would seem to insure that there will not be an investigation). Compare *Bridgeman II*, 476 Mass. 320-21 (describing "serious and pervasive collateral consequences that arise from a drug conviction"). Such failings by the Commonwealth overlap its disregard of this court's teaching as to the constitutional imperative which requires Commonwealth to determine and disclose the nature and extent of the impairment of its evidence. *Cotto*, 471 Mass. at 112, 115.

Granting direct appellate review in this matter would provide this Court with the opportunity to remedy such circumstance.

6. Why Direct Appellate Review is Appropriate.

The exercise of this Court's general superintendence powers in *Ware* and *Cotto* led directly to the Hampden Superior Court's comprehensive findings and intrepid holdings, which included - for the first time in this Commonwealth - dismissals grounded on presumptive prejudice. In reaching such results, that court has settled the vast majority of questions concerning the compromise of the Commonwealth's evidence at the Amherst laboratory - and has, thereby, done much to restore the confidence in our system which had been impaired by the wayward actions of several governmental agents.

In doing so, this Court - and then Judge Carey - did much to remove the Western part of the cloud that had been cast over the integrity of a substantial part of our system of justice. See *Cotto*, 471 Mass. at 115 ("[i]t is imperative 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, which has serious implications for the entire criminal justice system").

The Commonwealth's failure to investigate the conduct of Ms. Farak or any other chemist at the Hinton laboratory has allowed the Eastern part of that corrosive cloud to remain.

In essence, the Commonwealth's disregard of the teaching of this Court as to its constitutional obligations has corroded confidence in the integrity of our system of criminal justice. Such claim is not hyperbole or mere rhetoric, but rather is supported by the observation of the Suffolk Superior Court herein:

Trial judges are now faced with the undeniable reality that, twice over the past five years, the courts of Massachusetts have been asked to rely on representations by the Commonwealth that the tip of an obvious iceberg is not so menacing as it may seem, and that nothing more sinister lies underneath. Twice this premise has been proven wrong, at the cost of due process to criminal defendants. In short, Dookhan and Farak were each responsible for potentially thousands of unfair criminal proceedings, and thus occasions of injustice, despite repeated assurances that their misconduct was isolated and contained. *I frankly do not see why any trial judge or any defendant should be willing to rely purely on such government assurances yet again.*

R.A. 409 (underlining in original, italics added).

That those such as Judge Roach have lost confidence in the government's assurances illustrates the cost of permitting a corrosive cloud to remain, indefinitely, over the integrity of the work performed at one of our Commonwealth's drug testing facilities.

The grant of direct appellate review would work both to staunch that damage and to restore confidence in our system of justice. See *Bridgeman II*, 476 Mass. at 333-34 (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").

Staunching that damage and restoring such confidence is of paramount concern. See also *Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 302 (2009) ("[p]reserving public confidence in the integrity of our system of justice must be our paramount concern notwithstanding the costs our decision today might occasion").

7. Conclusion.

In light of the foregoing, justice would best be served by the grant of direct appellate review herein.

Respectfully submitted,
for Justino Escobar,

/s/ James P. McKenna

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October 19, 2017

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Appeals Court No. 2017-P-1287.

SUFFOLK COUNTY.

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

JUSTINO ESCOBAR,
Appellant.

Addendum.

Respectfully submitted
for Justino Escobar,

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October 19, 2017

Addendum
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK SS

COMMONWEALTH

v. 8/17/2017

JUSTINO ESCOBAR

Luray, J.

SUFFOLK SUPERIOR COURT
No. SUCR2009-10059.

following hearing, motion denied. Nothing on
the record demonstrates that the Inspector General engaged in
misconduct of any sort. I find no support in
fact or law.

Now comes Justino Escobar and, pursuant to Rule 30(b) of the Massachusetts Rules of Criminal Procedure, respectfully submits a motion to vacate his conviction and for the sanction of dismissal. Mr. Escobar respectfully incorporates herein by reference several pending motions: his July 20, 2015, Motion for a New Trial; his July 20, 2015, Motion for Leave to Conduct Post-Conviction Discovery; and, his October 5, 2015, Motion to Preserve Prospective Evidence, together with the exhibits filed with those motions.

As detailed in the accompanying memorandum, pursuant to this motion Mr. Escobar seeks to have his conviction in the above-captioned matter vacated and the underlying charge dismissed because of the egregious prosecutorial misconduct of the Massachusetts Inspector General. Following an investigation, on March 4, 2014, such official issued a report and press release which, in principal part, set forth the conclusion that Ms. Annie Dookhan had been the "sole bad actor" at the Drug Laboratory at the William B. Hinton State Laboratory Institute (the Hinton laboratory). Necessarily implicit in that stated conclusion was the proposition that the Inspector General had conducted an analysis as to whether there had been other bad actors at that laboratory.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUFFOLK SUPERIOR COURT
No. SUCR2009-10059.

COMMONWEALTH)
v.)
JUSTINO ESCOBAR)

MR. ESCOBAR'S MOTION
FOR A *COTTO* ORDER.

Now comes Justino Escobar and respectfully submits a motion for an Order consistent with the Supreme Judicial Court's holding in *Commonwealth v. Cotto*, 471 Mass. 97, 115 (2015), which order would require the Commonwealth to disclose within thirty days whether it will conduct an investigation as to whether any chemists at the Hinton laboratory - besides Ms. Dookhan and Ms. Farak - engaged in malfeasance which impaired the integrity of the Commonwealth's evidence.

Such an investigation is imperative to remove the cloud that has been cast over the integrity of the work performed at that facility, which has serious implications for the entire criminal justice system.

Following hearing motion DENIED.
The Commonwealth does not

establish a general rule for the issuance of investigative orders in other cases, particularly orders as broad in scope as this motion suggests. To the extent defendant's motion for new trials is ultimately deemed by the court to have any merit, a more tailored and narrow order may be appropriate but those issues

have not yet been determined, having just been taken under advisement today.

Respectfully submitted
for Justino Escobar,

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Adri Escobar, Jr.
8/17/2017

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DOCKET NO. SUCR 2009-10059

COMMONWEALTH

v.

JUSTINO ESCOBAR

**RULING AND ORDER ON DEFENDANT'S MOTION
FOR POST-CONVICTION DISCOVERY**

Defendant Justino Escobar plead guilty in December, 2009 to trafficking in cocaine with a net weight in excess of fourteen grams. He was sentenced to 8-12 years in state prison. The plea represented a charge concession on the part of the Commonwealth. The drug samples involved in Defendant's case were analyzed in December, 2008, at the William A. Hinton State Laboratory Institute. The certificate of drug analysis (for 252.18 grams of cocaine) is signed by Della Saunders and Kate Corbett.

Mr. Escobar began seeking to challenge his plea in the summer of 2015. His first Motion for New Trial (Docket, Paper 32) and Motion for Leave to Conduct Post-Conviction Discovery (Paper 33) were filed in July, 2015. Multiple motions seeking different remedies have followed, but until recently were not heard. Beginning in June, 2016, the case was stayed along with many others due to the Bridgeman proceedings before the SJC. Once the stay ended and new (or renewed) pleadings were filed on both sides, the court granted defendant's motion for non-evidentiary hearing. A hearing was held on August 17, 2017. Certain motions heard that day have already been ruled on by margin endorsement.

The discovery motion requires a bit more explanation. Defendant's various pleadings on this subject present a moving target, in that he has sought different discovery for different reasons at different times. The allegations and my reasoning with respect to a fair order are outlined below. Defendant's Motion for Leave to Conduct Post-Conviction Discovery (Paper 33) is **ALLOWED TO THE LIMITED EXTENT OUTLINED BELOW, and OTHERWISE DENIED.**

The Dookhan Allegations and the Inspector General Report

In March, 2014, the Massachusetts Inspector General issued a report entitled "Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute, 2001-2012." (IG Report). The IG's investigation was triggered by widespread concern over the actions of Hinton drug analyst Annie Dookhan. Dookhan resigned from her job in early 2012; was arrested in September, 2012; and pleaded guilty in November, 2013, to twenty-seven counts including obstruction of justice and tampering with evidence. The IG Report documented wholesale misconduct by Dookhan which included: "dry labbing; contaminating samples; removing samples from the evidence locker without following proper procedures; postdating entries in the log book; and forging others' initials." "Dookhan also had an unusually high productivity level in the lab. She reported test results on samples at rates consistently much higher than any other chemist in the lab." According to the SJC, an internal Hinton Lab report stated that "Dookhan's consistently high testing volumes should have been a clear indication that a more thorough analysis and review of her work was needed." Commonwealth v. Scott, 467 Mass. 336, 339-340 (2014).

The IG Report concluded that, notwithstanding widespread deficiencies in training, protocols, chemist oversight, and security, "Dookhan was the sole bad actor at the Drug Lab.

Though many of the chemists worked alongside Dookhan for years, the OIG found no evidence that any other chemist at the Drug lab committed any malfeasance with respect to testing evidence or knowingly aided Dookhan in committing her malfeasance.” IG’s report at page 1, Executive Summary. That said, reportedly thousands of individual defendants have waited years to see any resolution of their challenges to Dookhan’s work. Bridgeman II, 476 Mass. 298 (2017).

The Farak Allegations and the Attorney General Reports

Sonja Farak worked as a chemist at the Amherst drug lab from August 2004 until its closure on January 18, 2013. Farak transferred to Amherst from the Hinton Lab, where she had worked from 2002 to 2004.¹ At the hearing before me, counsel for Defendant emphasized that Farak continued to test drug samples from Hinton for several years after arriving at Amherst.² Counsel for the Commonwealth emphasized in rebuttal that these individual samples were shipped directly to Amherst from Hinton, are identifiable by control number, and have no connection to the sample tested in 2008 in Mr. Escobar’s case.

On January 6, 2014, Farak plead guilty to tampering with evidence at, and stealing cocaine from, the Amherst facility. In its 2015 decision prior to a full investigation by the Commonwealth, the SJC opined that “it appears from the record that Farak was tampering with evidence at the Amherst drug lab in order to support her own cocaine habit,” and ruled that the Commonwealth had a duty to “thoroughly investigate the timing and scope of Farak’s misconduct at the Amherst drug lab.” Commonwealth v. Cotto, 471 Mass. 97, 109, 115 (2015).

¹ Only approximately one half of this time was in the drug portion of the lab.

² As I understand it, Farak was not singled out to receive these samples. The Amherst lab was participating in a program to assist the Hinton lab with overflow work, and any available Amherst chemists were assigned to these samples as part of their job.

The Commonwealth ultimately responded to Cotto in two ways. An Assistant Attorney General issued, on April 1, 2016, a document entitled “Investigative Report Pursuant to Commonwealth v. Cotto,” 471 Mass. 97 (2105), also known as the Caldwell Report. Two Special Assistants Attorney General oversaw an investigation resulting in a second report. Following these investigations, it has become apparent that the scope of Farak’s compromising of our criminal justice system rivals that of Dookhan. See Bridgeman II, 476 Mass. at 313 n. 17 (“[T]he full scope of Farak’s misconduct has yet to be determined.”); Commonwealth v. Scott, 467 Mass. at 341-342 (“her [Dookhan’s] wrongdoing has had an enormous impact on the criminal justice system in Massachusetts.”); Commonwealth v. Charles, 466 Mass. 63, 65 & 89.

This Case

There is no allegation that Dookhan or Farak signed Mr. Escobar’s certification, or that either of them supervised the analyst who did. There is no evidence on this record that Dookhan or Farak had anything to do with Mr. Escobar’s drug sample in 2008. The fact that Farak worked at Hinton five years earlier is irrelevant. Thus, Dookhan and Farak are both personally irrelevant to this case. Not so, however, the examples they have set and some of the lessons learned.

The potentially troubling piece of information in this case is that Della Saunders, the chemist who did analyze the drugs seized from Mr. Escobar, was identified by certain data included in the IG Report as having drug testing productivity numbers to rival Dookhan’s during portions of the 2002-2012 time period reviewed. The core argument in both Defendant’s motion for new trial and his motion for discovery is, thus: “the fact that another chemist reported a comparable number of results supports the conclusion that such other chemist engaged in comparable conduct.” Paper 33 at page 1.

The Rule 30 Standard As Applied to this Case

The Commonwealth is of course quite correct that Rule 30 generally requires specific -- not speculative or conclusory -- allegations that new evidence would have aided a defense.

Cotto, 471 Mass. at 113-114 (“wholly speculative” nature of the allegations of Farak’s misconduct at that time). Both sides engaged in rampant speculation at the hearing before me about why Ms. Saunders’ production numbers might have been high. The Commonwealth maintains that it is the Defendant’s burden to make a sufficiently adequate showing warranting an evidentiary hearing for new trial. Opposition at page 6.³ But there is no denying that in Scott, and then again in Cotto, the SJC embroidered on the usual Rule 30 protocol, in an effort to ensure fairness to drug defendants in the Commonwealth in the face of extraordinary circumstances.

In Scott, the Court established that drug defendants whose cases bore a Dookhan certification as primary or secondary chemist presumptively met the first prong of a two-prong standard for new trial. 467 Mass. at 354. In Cotto the court acknowledged the difficulty of a defendant’s bearing this production burden absent a more full-scale investigation by the Commonwealth of lab activities: “[T]he systemic nature of Dookhan’s misconduct only came to light following a thorough investigation of the Hinton drug lab. . . . The burden of ascertaining whether Farak’s misconduct at the Amherst drug lab has created a problem of systemic proportions is not one that should be shouldered by defendants in drug cases.” 471 Mass. at 111-112.

³ This argument is true as far as it goes, in keeping with Commonwealth v. Shuman, 445 Mass. 268, 278 (2005)(seriousness of claim presented, and adequacy of defendant’s factual showing).

In short, it is not surprising that Mr. Escobar “produces no actual evidence in support of his claim that Della Saunders engaged in malfeasance as a chemist employed at the Hinton Lab.” Commonwealth’s Opposition (Paper 45), at page 6. As far as the court is aware, investigation of the Hinton lab essentially ended with the IG report, which mentions chemist Saunders exactly twice.

The Commonwealth points out that in Cotto, the SJC was faced with criminal charges, yet still declined to apply the Scott presumption, due to the insufficiency of Scott’s evidence of misconduct touching his case. 471 Mass at 110. But this argument is unpersuasive under all of the current circumstances. Trial judges are now faced with the undeniable reality that, twice over the past five years, the courts of Massachusetts have been asked to rely on representations by the Commonwealth that the tip of an obvious iceberg is not so menacing as it may seem, and that nothing more sinister lies underneath. Twice this premise has been proven wrong, at the cost of due process to criminal defendants. In short, Dookhan and Farak were each responsible for potentially thousands of unfair criminal proceedings, and thus occasions of injustice, despite repeated assurances that their misconduct was isolated and contained. I frankly do not see why any trial judge or any defendant should be willing to rely purely on such government assurances yet again.

On the other hand I cannot agree with the defense position that the Cotto decision provides for a general investigative order of a lab or a chemist any time a chemist’s work is challenged. Nor should the existence of two extraordinarily “bad actors” automatically create suspicions about, and cast aspersions upon, other hard-working and law-abiding chemists. If chemist Saunders were not associated with what arguably would appear to be very high testing numbers, I would likely have denied Defendant’s Motion for New Trial without further hearing

or discovery. Similarly, to the extent any source of expertise on the Hinton Lab had documented some follow-up investigation of Saunders and her numbers, Defendant's discovery motion would be significantly weaker.

As this record currently stands, however, I am aware of only the following very limited factual material on Saunders: She worked at the Hinton Lab in 2008 as Senior Chemist III and team leader; she volunteered to supervise the room Dookhan worked in, but that offer was not accepted by her supervisor; and during the period 2005-2008 it would appear that Saunders' productivity with respect to drug testing was higher than many other chemists, though not quite so as high as Dookhan's.

That said, I do not purport to know how to interpret, without more,⁴ the so-called "pivot table" of drug testing data presented in Defendant's papers. And I am constrained to add that the limited material about Saunders is presented against the backdrop of (apparently uncontested) findings of significant training, protocol, chemist oversight, and security deficits at the Hinton lab during this period of time, including late 2008 when the drugs in this case were tested.

Conclusion

For all of these reasons, I cannot rule fairly on Defendant's Motion for New Trial without certain limited discovery about chemist Saunders and her work. **Defendant's Motion for New Trial (Paper 32) will not be taken under advisement until this discovery is completed.**

Defendant's Motion for Leave to Conduct Post-Conviction Discovery is ALLOWED as Follows, and Otherwise DENIED:

⁴ I have also reviewed in this regard the Affidavit of Nathan Tamulis, dated 6/21/16 which sets forth his work on behalf of CPCS with Hinton lab database information on drug sample work by the chemists. But this affidavit appears to be focused primarily on the work of Farak (and Dookhan), which I have ruled is immaterial to Mr. Escobar's claim. While I appreciate Mr. Tamulis appears to be stating that the referenced database may be used to analyze the work of other chemists, I have located no such analysis of Saunders' work in this file.

The Commonwealth shall produce to the Defendant within 60 days, by no later than October 27, 2017, the following information on chemist Della C. Saunders for the period 2002-2009, unless otherwise stated:

- Those non-privileged portions of her personnel file from the Hinton lab which shall indicate her dates of employment; job titles and responsibilities; training attended or conducted; supervisors; performance reviews; complaints and commendations; hours worked; and compensation received.
- Any notes, transcripts, or other documentation of interviews of Saunders conducted during the period 2002 to present, by any person or entity engaged in an investigation of the Hinton or Amherst labs;
- A list of court cases in which Saunders testified as certifying chemist in the Commonwealth during the years 2005-2008;
- Available data on the numbers and types of drug tests performed by Saunders at the Hinton lab for any purpose for the years 2005-2008.

To the extent any of this material has already been produced to the Defendant through some other mechanism or source, it need not be re-produced.

The parties to appear for a status conference in Courtroom 906 on a date in November, 2017 to be scheduled with the Session Clerk.

SO ORDERED.

Dated: August 25, 2017

A handwritten signature in black ink, appearing to read "Ruth J.", is written over a horizontal line. To the left of the line is a stylized, looped mark that looks like a combination of a 'B' and a 'J'.

SUCR 2009-10059

Commonwealth of Massachusetts

Suffolk, to wit:

*At the Superior Court, begun and
helden at the City of Boston, within and for the
County of Suffolk, for the Transaction of Criminal Business, on the
first Monday of December in the year of our Lord of Two Thousand
and Nine.*

*The Honorable Stephen Neel, Associate Justice
of said Court presiding.*

INDICTMENT

Trafficking in Cocaine
C. 94C, §32E (b) (4)*Commonwealth of Massachusetts*

SUFFOLK, SS.

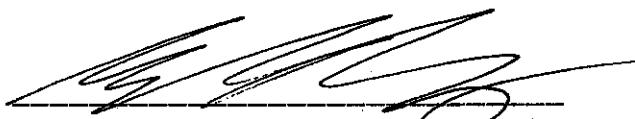
At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS,
begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of January in
the year of our Lord two Thousand and nine.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

JUSTINO ESCOBAR,

on November 8, 2008, did traffick in cocaine, a derivative of coca leaves, a Class B controlled substance under the provisions of G.L. c. 94C, § 31, by unlawfully, knowingly, and intentionally possessing with intent to distribute a net weight of two hundred grams or more of a mixture containing cocaine.

A TRUE BILL



Assistant District Attorney



Foreman of the Grand Jury

Superior Court Department - Criminal Business

January, Sitting, 2009

JAN 27 2009

Returned into said Superior Court by the Grand Jurors and ordered to be filed.


Maura A. Harrington
Clerk Of Court



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report**

0984CR10059 Commonwealth vs. Escobar, Justino

CASE TYPE: Indictment	FILE DATE: 01/27/2009
ACTION CODE: 94C/32E/A-0	CASE TRACK: A - Standard
DESCRIPTION: COCAINE, TRAFFICKING IN c94C §32E(b)	
CASE DISPOSITION DATE 11/08/2011	CASE STATUS: Open
CASE DISPOSITION: Active	STATUS DATE: 01/27/2009
CASE JUDGE:	CASE SESSION: Criminal 2

LINKED CASE

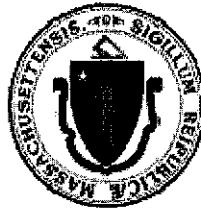
0984CR10062

DCM TRACK

Tickler Description	Due Date	Completion Date
Pre-Trial Hearing	02/04/2009	11/08/2011
Final Pre-Trial Conference	07/21/2009	11/08/2011
Case Disposition	08/03/2009	11/08/2011

PARTIES

Prosecutor Suffolk County District Attorney One Bulfinch Place Boston, MA 02114	661384 Melissa Lynne Brooks Suffolk County District Attorney Suffolk County District Attorney One Bulfinch Place Boston, MA 02114 Work Phone (617) 619-4000 Added Date: 11/25/2015
	563839 John P Zanini Office of Suffolk County D.A. Office of Suffolk County D.A. One Bulfinch Place Boston, MA 02114 Work Phone (617) 619-4000 Added Date: 05/23/2017
	Attorney for the Commonwealth 685422 Ian M Leson Suffolk County DA Suffolk County DA 1 Bulfinch Place 3rd floor Boston, MA 02114 Work Phone (617) 619-4000 Added Date: 07/11/2016



**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report**

Defendant Escobar, Justino 21 Strawberry Street Lynn, MA 01901	Appointed - Indigent Defendant James Philip McKenna Attorney at Law Attorney at Law PO Box 541 North Grafton, MA 01536 Work Phone (774) 317-0983 Added Date: 01/14/2011	548681
Other interested party Stanton, Clerk, Hon. Joseph Clerk of the Appeals Court John Adams Courthouse, Suite 1200 One Pemberton Square Boston, MA 02108-1705		

PARTY CHARGES

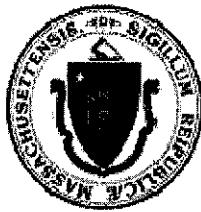
#	Offense Date/ Charge	Code	Town	Disposition	Disposition Date
1	11/08/2008 COCAINE, TRAFFICKING IN c94C §32E(b)	94C/32E/A-0	Boston	Guilty Plea - Agreed Upon (Lesser Offense)	12/03/2009

EVENTS

Date	Session	Event	Result	Resulting Judge
02/04/2009	Magistrate's Session	Arraignment	Held as Scheduled	
03/19/2009	Magistrate's Session	Pre-Trial Conference	Held as Scheduled	
04/23/2009	Magistrate's Session	Pre-Trial Conference	Rescheduled	
05/27/2009	Magistrate's Session	Pre-Trial Conference	Held as Scheduled	
06/29/2009	Magistrate's Session	Hearing RE: Discovery Motion(s)	Held as Scheduled	
07/21/2009	Criminal 5	Final Pre-Trial Conference	Canceled	
07/27/2009	Criminal 9	Evidentiary Hearing on Suppression	Held as Scheduled	
08/03/2009	Criminal 5	Jury Trial	Rescheduled	
09/16/2009	Criminal 5	Final Pre-Trial Conference	Held as Scheduled	
09/23/2009	Criminal 5	Jury Trial	Rescheduled	
12/03/2009	Criminal 5	Jury Trial	Not Held	
12/03/2009	Criminal 2	Hearing for Change of Plea	Held as Scheduled	
08/17/2017	Criminal 6	Motion Hearing	Held as Scheduled	Roach

FINANCIAL SUMMARY

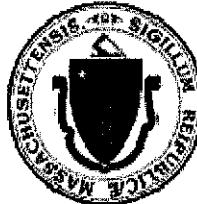
No Financial Data for this report



COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total				

**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report**



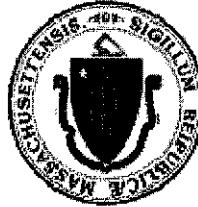
INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
01/27/2009	1	Indictment returned	
01/27/2009	2	MOTION by Commonwealth for arrest warrant to issue; filed & allowed Lauriat, J.	
01/27/2009		Warrant on indictment issued	
01/27/2009		Warrant was entered onto the Warrant Management System	
02/04/2009		Defendant brought into court.	
02/04/2009		Interpreter present: Farias, Maria on 2/4/2009	
02/04/2009	3	Appearance of Deft's Atty: Lawrence M Perlmutter	
02/04/2009		Deft arraigned before Court	
02/04/2009		Deft waives reading of indictment	
02/04/2009		RE Offense 1:Plea of not guilty	
02/04/2009		Deft notified of right to request drug exam	
02/04/2009		Bail set: \$500,000.00 Surety or \$50,000.00 Cash w/o/p. Bail warning read. Mittimus issued.	
02/04/2009	4	Commonwealth files notice of appearance.	
02/04/2009	5	Commonwealth files statement of the case.	
02/04/2009	6	Commonwealth files notice of discovery I.	
02/04/2009		Assigned to Track "A", see scheduling order	
02/04/2009		Tracking deadlines Active since return date	
02/04/2009		Case Tracking scheduling order (Connie S Wong, Magistrate) mailed 2/4/2009	
02/04/2009		Continued to 3/19/2009 for hearing on PTC	
02/04/2009		Continued to 7/21/2009 for hearing on FPTH	
02/04/2009		Continued to 8/3/2009 for hearing on PTD (Connie S Wong, Magistrate) - B. Fahy, ADA - ERD/JAVS - L. Perlmutter, Attorney	
02/04/2009		Warrant canceled on the Warrant Management System 2/4/2009	
03/19/2009		Defendant comes into court, hearing continued until 4/23/2009 re: further pre-trial conference. (Note: Discovery provided this date. Atty communicated next date w/defendant - no interpreter present)	
03/19/2009	7	Commonwealth files notice of discovery II. Wilson, Mag - B. Fahy, ADA - ERD/JAVS - L. Perlmutter, Attorney	
04/23/2009		Defendant comes into court, hearing continued until 5/27/2009 re: pre-trial conference. (Note: ADA on Trial this day). Wilson, Mag - ERD/JAVS - L. Perlmutter, Attorney	
05/27/2009		Defendant comes into court, hearing continued until 6/29/2009 re: discovery & to file motions.	
05/27/2009	8	Pre-trial conference report filed	



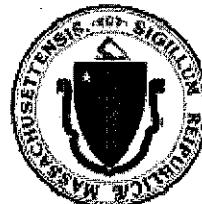
**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CRIMINAL
Docket Report**

05/27/2009		Interpreter present: Farias, Maria on 5/27/2009. Wilson, Mag - M. Fahy, ADA - ERD/JAVS - L. Perlmutter, Attorney
06/29/2009		Defendant came into court.
06/29/2009	9	Defendant's MOTION to suppress search and seizure without a warrant with an affidavit in support thereof.
06/29/2009	10	Deft files motion to dismiss with a memorandum of law in support there of
06/29/2009		Continued to 7/27/2009 by agreement re: motion to suppress. FPTC date canceled by agreement, to be rescheduled. Wilson, MAG - B. Fahy, ADA - ERD - L. Perlmutter, attorney
07/27/2009		Defendant comes into Court
07/27/2009		Interpreter present: Luis Perez
07/27/2009		After hearing re: Defendant's Motion to Suppress Search and Seizure (P #9) Court denies motion. See record for findings and rulings.
07/27/2009		MOTION by Commonwealth for increase in bail orally made and allowed after hearing. Prior orders of bail revoked.
07/27/2009		Bail set: Two Million (\$2,000,000) dollars with surety or Two Hundred Thousand (\$200,000) dollars cash. Mittimus issued, bail warning read.
07/27/2009		After hearing re: defendant's motion to dismiss (P #10) Court denies motion.
07/27/2009		Continued by agreement to 9/16/09 for FPTC-5th session and 9/23/09 in Fifth session for trial. Helyl,J-B.Fahy, ADA-JAVS, CR- L.Perlmutter, Attorney.
07/28/2009	11	MEMORANDUM of decision and order on Defendant's Motion to Suppress, filed. (B.Fahy, ADA and L.Perlmutter, Atty. notified with copies 7/29/09)
07/28/2009	12	Findings on Order increasing bail, filed. Helyl,J. (ADA B. Fahy and Atty, L. Perlmutter notified w/copies 7/29/09)
08/07/2009	13	Commonwealth files Notice of Discovery III.
08/07/2009	14	Commonwealth files List of Potential Witnesses.
08/07/2009	15	Commonwealth files Notice of Expert Witness.
09/09/2009	16	Attorney, Lawrence M Perlmutter's MOTION to withdraw as counsel of record for Justino Escobar.
09/16/2009		Defendant brought into court for Final Pretrial Conference.
09/16/2009		Interpreter present and sworn: Farias, Maria on 9/16/2009
09/16/2009	17	Filed: Joint Pre-Trial Memorandum
09/16/2009		Continued by agreement to 12/3/2009 for Trial Fifth Session. Giles, J. - B. Fahy, ADA - O. Santana, Attorney - C. Johnson, Court Reporter.
12/01/2009	18	Commonwealth files Notice of Discovery IV.
12/03/2009		Court case received via 5th criminal session



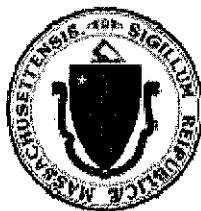
**COMMONWEALTH OF MASSACHUSETTS
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12/03/2009		Defendant brought into court - Spanish interpreter - Maria Farias sworn. Defendant offers to change plea to guilty. After colloquy, Court accepts defendant's change of plea. Defendant pleads guilty to so much of ind. # 001 - Trafficking in Cocaine - 94C sec. 32E(b)(1) (14 to 28 grams)
12/03/2009	19	Waiver of defendants' rights filed
12/03/2009		Defendant warned per Chapter 278, Sec 29D of alien status
12/03/2009		Defendant warned per Chapter 22E Sec. 3 of DNA
12/03/2009		Defendant warned of potential loss of license. Abstract issued to Registry
12/03/2009		RE Offense 1: Guilty Plea as agreed upon (Lesser offense)
12/03/2009		As to so much of Off. #001 (14 to 28 grams) - M.C.I. at Cedar Junction - Max: Twelve (12) Years - Min: Eight (8) Years. Mittimus issued
12/03/2009		Victim-witness fee assessed: \$90.00 imposed (Stephen E Neel)
12/03/2009		Drug fee assessed: \$150.00 imposed
12/03/2009		Sentence credit given as per 279:33A: 266 days credit
12/03/2009		Notified of right of appeal under Rule 64
12/03/2009	20	Commonwealth files statement of partial Nolle Prosequi by ADA B.Fahy and entered as to the underlying Off. 001 over 200 grams. Neel, J. - B.Fahy, ADA - N.McCann, C.R. - O.Santana, Atty
01/08/2010		Victim-witness fee paid as assessed. 90.00
01/13/2010		Drug fee paid as assessed in the sum of \$150.00.
03/29/2010	21	Deft files Pro-Se Motion to vacate and reimpose sentence to permit timely filing of motion to revise and revoke and affidavit (Neel, J notified 3/29/10)
03/29/2010	22	Notice of appeal from sentence to Cedar Junction MCI (Walpole) filed by Justino Escobar (Rouse, CJ., Nell, J and CPO S. Stillwell notified 3/29/10)
04/01/2010		Re: (P#21) - After Consideration, the Motion is denied. Neel, J. (Notice sent to defendant, pro se on 4/2/2010)
04/21/2010	23	Deft files Motion to be declared indigent with affidavit of indigency
04/21/2010	24	Deft files: Motion to refer case to CPCs screening panel with affidavit in support of. (Notice sent to Neel, J. 4/21/2010)
12/02/2010		MOTION (P#23) The matter is referred to CPCs for such actions as it deems appropriate Neel, J (Deft Pro-Se and CPCs notified 12/6/10)
01/14/2011		Notice of assignment of counsel received from CPCs appointing Atty. James McKenna for direct appeal
03/04/2011	25	Notice of limited appearance of Deft's Atty: James P McKenna
05/11/2011	26	Order from Appellate Division of the Superior Court Department for the Review of Sentence it is ORDERED that the judgments imposing said sentences stand and that said appeal be and is hereby dismissed. Dortch-Okara, Gershengorn & Welch, JJ.



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11/03/2011	27	Deft files Motion for payment for a transcript of the hearing relative to the change of plea (Gaziano, J notified)
11/08/2011		Re: MOTION (P#27) for payment of transcript allowed. Gaziano, RAJ.
11/08/2011		Court Reporter McCann, Nancy is hereby notified to prepare one copy of the transcript of the evidence of 12/03/2009 (Mailed 11/8/2011)
04/17/2012	28	Deft files Motion to Compel (Locke, J notified with copy and docket sheets)
05/17/2012		Transcript of testimony received Hearing re: Plea Change from Transcript of proceedings from Court Reporter McCann, Nancy
05/30/2012		Notice sent to attorneys that transcripts are available.J. McKenna and J. Zanini
03/04/2013	29	Deft files Motion for return of property (Locke, RAJ w/copy)
03/08/2013		Motion (Paper #29) For Return of Property allowed. Locke, J.
11/14/2014	30	Deft files: Motion for disclosure of chain of custody. (Notice sent Locke, RAJ. w/copy - (P#30) & docket sheets - 11/17/14)
12/08/2014		MOTION (P#30) allowed as endorsed. Locke, RAJ (Atty McKenna and ADA Zanini notified with copy)
01/08/2015	31	Commonwealth files : Response to defendant's motion for disclosure of chain of custody (Notices sent to Locke,J and Atty. James P. Mckenna) 1/8/2015
07/21/2015	32	Defendant files Motion for a New Trial. (Copy with docket and notice to Locke, RAJ) (Copy with notice to J. Zanini, ADA)
07/21/2015	33	Defendant files Motion for Leave to Conduct Post-Conviction Discovery. (Copy with docket and notice to Locke, RAJ) (Copy with notice to J. Zanini, ADA)
08/11/2015		ORDERED: re:p# 32- Defendants motion for a new trial - Commonwealth is ordered to file a response or opposition within *(60) sixty days. (Locke, RAJ)
08/11/2015		ORDERED: re:p# 33- Defendants motion for leave to conduct post-conviction discovery-Commonwealth is ordered to file a response or opposition within (60) sixty days. (Locke, RAJ)
10/07/2015	34	Defendant 's Motion to Preserve Prospective Evidence (Notice sent to Locke, J. with copy of Motion and Docket Sheets).
10/07/2015		The following form was generated:
		Clerk's Notice Sent On: 10/07/2015 08:34:40
10/09/2015		Endorsement on Motion to preserve prospective evidence, (#34.0): Other Locke action taken Endorsed as follows; Commonwealth ORDERED to respond within 30 days, and to provide notice of the instant motion to 3rd party custodians of drug exhibits. Locke, RAJ



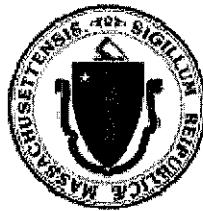
**COMMONWEALTH OF MASSACHUSETTS
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10/15/2015		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James Philip McKenna, Esq. Attorney: John P Zanini, Esq.
10/15/2015		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James Philip McKenna, Esq. Attorney: John P Zanini, Esq. Holding Institution: MCI - Concord
11/18/2015	35	Defendant's Motion to vacate and for the sanction of dismissal filed (notice w/copy and docket to Locke, RAJ, copy with notice to Zanini, ADA (also sent electronically to ADA) Applies To: Zanini, Esq., John P (Attorney) on behalf of Commonwealth (Prosecutor)
11/18/2015	36	General correspondence regarding Letter received from Attorney J. McKenna addressed to Locke, RAJ (notice w/copy and docket to Locke, RAJ, copy with notice to Zanini, ADA (also sent electronically to ADA)
11/18/2015		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James Philip McKenna, Esq. Prosecutor: Commonwealth Attorney: John P Zanini, Esq.
11/23/2015		Endorsement on Motion to vacate and for the sanction of dismissal., Locke (#35.0): Other action taken 11/30/2015 Commonwealth ordered to file a response on opposition within (30) days or motion for new trial shall be deemed "unopposed". Locke, RAJ.
11/25/2015		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James Philip McKenna, Esq. Attorney: Melissa Lynne Brooks, Esq. Attorney: John P Zanini, Esq.
11/25/2015	37	General correspondence regarding Commonwealth's notice of appearance, Melissa Brooks, ADA filed
11/25/2015	38	Commonwealth's Assented to Motion for additional time to respond to Defendant's motion for post-conviction discovery filed (Copy w/notice, docket to Locke, RAJ and copy w/notice to J. McKenna, Attorney)
11/25/2015	39	Commonwealth's Response to Defendant's motion to preserve evidence filed (Copy w/notice, docket to Locke, RAJ and copy w/notice to J. McKenna, Attorney)
11/30/2015		Endorsement on Motion for (assented) additional time to respond to Locke Defendant's motion for post-conviction discovery filed. (Notice and copy to ADA M. Brooks and Atty J. McKenna), (#38.0): ALLOWED with assent of defendant.



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12/03/2015		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James Philip McKenna, Esq. Attorney: Melissa Lynne Brooks, Esq.
12/03/2015		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James Philip McKenna, Esq. Holding Institution: MCI - Concord Attorney: Melissa Lynne Brooks, Esq.
12/14/2015	40	General correspondence regarding Correspondence received from Defense Counsel regarding errors cited on the Memorandum in Support of Mr. Escobar's Motion to Vacate and for the sanction of dismissal letter states this document has significant typographical errors as to dates on page 9 (the wrong years were used) Corrected copy of page 9 included) (Notice sent to Locke-RAJ, with copy of Correspondence and Docket Sheets).
01/28/2016	41	Defendant's Motion for leave to conduct post-conviction discovery of email records (Copy w/notice, docket to Locke, J and copy w/notice to M. Brooks)
02/05/2016	42	Defendant's Motion for leave to conduct post-conviction discovery of police reports (Copy w/notice, docket to Locke, J and copy w/notice to M. Brooks)
02/16/2016	43	General correspondence regarding Letter addressed to Roach RAJ from Atty J. McKenna requesting Defendant's July 20, 2015 Motion for New Trial be allowed as unopposed. (Roach RAJ notified)
02/19/2016		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Melissa Lynne Brooks, Esq. Other interested party: Hon. Jeffrey A Locke
02/19/2016		The following form was generated:
02/19/2016		The following form was generated: Clerk's Notice Sent On: 02/19/2016 10:20:35
02/19/2016		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Melissa Lynne Brooks, Esq. Other interested party: Hon. Jeffrey A Locke
04/20/2016	44	Defendant's Motion for Enforcement of this Court's Order w/attached Exhibits in support thereof filed (Roach RAJ notified)
05/26/2016	45	Commonwealth's Notice of opposition to the Defendant's Motions for New Trial and for post-conviction Discovery filed. (Roach RAJ notified)
05/26/2016	46	Justino Escobar's Memorandum Supplemental memorandum in support of unopposed Motions filed. (Roach RAJ notified)
06/09/2016	47	Justino Escobar's Memorandum In Reply to the Commonwealth's Opposition filed. (Roach RAJ notified)



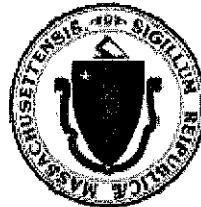
**COMMONWEALTH OF MASSACHUSETTS
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06/15/2016	48	Defendant's Motion for leave to conduct post-conviction discovery of information held by the Commonwealth filed. (Roach RAJ notified with copy)	
06/28/2016	49	ORDER: Ruling and Order of Roach, RAJ on Stay of Proceedings Issued and Filed Note: Druge Lab Proceedings Stayed Pending Further Order of the Court 7/15/16 Drug Lab Event Canceled ADA I Leson and ATTY J McKenna Notified w / Copy of Rulings and Order and Docket Entry Notice	Roach
07/11/2016		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James Philip McKenna, Esq. Attorney: Ian M. Leson, Esq.	
08/26/2016	50	Defendant's Memorandum regarding Support of his Motion to Vacate and for the Sanction of Dismissal (Copy with Docket sent to Roach on 8/30)	
08/30/2016		The following form was generated: A Clerk's Notice was generated and sent to: Other interested party: Christine Roach RAJ	
11/18/2016	51	Defendant's Memorandum in Further Support of Mr. Escobar's Motion to Vacate and for the Sanction of dismissal. filed. (Roach, RAJ w/ copy)	
12/03/2016		Endorsement on Memorandum regarding further memorandum in support of Mr. Escobar's motion to vacate and for the sanction of dismissal, (#51.0): No Action Taken (James P. McKenna, Atty with copy)	Roach
12/06/2016		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James Philip McKenna, Esq.	
02/13/2017	52	Defendant's Memorandum regarding BridgemanII	
05/12/2017	53	Defendant's Memorandum regarding the Commonwealth's violation of its duties to investigate and to learn. filed. (Copy and docket sent to Roach, RAJ)	
05/19/2017		Endorsement on Memorandum regarding the Commonwealth's violation of its duties to investigate and to learn., (#53.0): ALLOWED endorsed as follows, request for hearing denied without prejudice, the court is not hearing Bridgeman cases absent a specific motion explaining how this case fits into the Bridgeman protocol and why it is ripe for review. (Copy of endorsement sent to J. McKenna Atty, M. Brooks ADA, and J. Zanini ADA)	Roach
06/05/2017	54	Defendant's Motion for a hearing filed (Copy w/docket to Roach, RAJ)	
06/08/2017	55	Defendant's Motion for a COTTO Order filed, with memorandum of law in support thereof (Copy to Roach, RAJ w/docket)	



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06/12/2017	56	Defendant's Supplemental Motion in memorandum in support of his motion for a COTTO Order filed (Copy to Roach, RAJ w/docket)	
06/12/2017		Endorsement on Motion for a hearing, (#54.0): DENIED Motion for a hearing denied without prejudice. Commonwealth to respond to all pending motions in this case not controlled by the Bridgeman protocol within 30 days, by no later than July 17, 2017 (Copy of endsmt to M. Brooks, ADA, J. Zanini, ADA and J. McKenna, Attorney and Ian Leson, ADA)	Roach
06/16/2017		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James Philip McKenna, Esq. Attorney: Melissa Lynne Brooks, Esq. Attorney: John P Zanini, Esq. Attorney: Ian M. Leson, Esq.	
07/03/2017	57	Defendant's Memorandum in regarding of Judge Carey's decision of June 26, 2017 (Roach, RAJ, Original motion sent)	
07/03/2017		The following form was generated:	
07/03/2017		The following form was generated: Clerk's Notice Sent On: 07/03/2017 15:14:38	
07/03/2017		The following form was generated: A Clerk's Notice was generated and sent to: Other interested party: Christine Roach RAJ	
07/05/2017	58	's Supplemental Motion in Supplemental Memorandum in support of motion for a Cotto Order filed The following form was generated: A Clerk's Notice was generated and sent to: Christine Roach RAJ. w/copy of P#58 plus docket sheets on 7/5/2017	
07/07/2017		Endorsement on Supplement, Memorandum "Commonwealth to respond to the narrow and particular question of Faraks Role at the Hinton Lab during any and all time frames revelant to Mr. Escobars claims within 30 days by no later than August 11, 2017, (#58.0): Other action taken Roach, RAJ (Copy of endorsement to J. Zanini ADA electronacally and interoffice , copy to J. McKenna, Atty)	Roach
07/12/2017	59	Commonwealth's Statement regarding the status of the Defendant's Motions for New Trial and for post-conviction Discovery filed. (Roach RAJ notified)	
07/12/2017	60	Commonwealth's Motion in opposition for leave to conduct post-conviction Discovery of information held by the Commonwealth filed. (Roach RAJ notified)	
07/13/2017	61	Commonwealth's Motion in opposition to the Defendant's Motion for New Trial and for post-conviction Discovery filed. NOTE: This filing is being re-submitted by the Commonwealth. Original filed 5/26/16, P#45. (Roach RAJ notified)	



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08/10/2017	62	Commonwealth's Motion in opposition to the Defendant's Motion for a COTTO Order filed By agreement, Matter scheduled to 8/17/17 at 9AM for Non-Evidentiary Drug Lab Motion hrg. (Ctrm 906)	
08/14/2017	63	Defendant's Reply to both the Commonwealth's statement re: Status and memorandum in opposition to the Motion for Cotto Order filed (Roach RAJ notified with copy)	
08/17/2017		Defendant comes into Court. Spanish Interpreter bot Present, Defendant's presence was excused, Interpreter not requested. Hearing re: Drug Lab Motion held before Roach-RAJ (See General Record) After Hearing P#s 32, 33, 35, 48 and 55 Taken Under Advisement. Roach-RAJ. - I. Leson, ADA. - J. McKenna, Atty. - N. King, CR.	Roach
08/17/2017		Endorsement on Motion to Vacate and for the Sanction of Dismissal., (#35.0): DENIED as Endorsed. (Notice sent to I. Leson, ADA and J. McKenna, Atty. with copy of Endorsement)	Roach
08/17/2017		Endorsement on Motion for Leave to Conduct Post-Conviction Discovery of Information held by the Commonwealth., (#48.0): DENIED as Endorsed. (Notice sent to I. Leson, ADA and J. McKenna, Atty. with copy of Endorsement)	Roach
08/17/2017		Endorsement on Motion for a Cotto Order., (#55.0): DENIED as Endorsed. (Notice sent to I. Leson, ADA and J. McKenna, Atty. with copy of Endorsement)	Roach
08/25/2017	64	Notice of appeal filed. Applies To: Escobar, Justino (Defendant)	
08/25/2017		Court Reporter Nancy King is hereby notified to prepare one copy of the transcript of the evidence of 08/17/2017 09:00 AM Motion Hearing Courtroom 906	
08/25/2017		Endorsement on Motion for Leave to Conduct Post-Conviction Discovery., (#33.0): ALLOWED Endorsed as follows, Following hearing, motion allowed in very limited part with respect to chemist Saunders and otherwise denied. Please see ruling and order of this date. (Copy sent to J. McKenna Atty and I. Leson ADA)	Roach
08/25/2017	65	ORDER: Ruling and order on defendant's motion for Post Conviction Discovery. (Copy of order sent to J. McKenna Atty, and I. Leson ADA)	Roach
09/11/2017	66	Notice of appeal filed. Applies To: Escobar, Justino (Defendant)(Denial of Defendant's request for leave to conduct an investigation relative to chemist Saunders)	
09/11/2017	67	Notice of appeal filed. Applies To: Leson, Esq., Ian M (Attorney) on behalf of Suffolk County District Attorney (Prosecutor). (Partial allowance of the defendant's motion for post conviction discovery)	

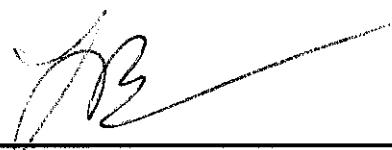


COMMONWEALTH OF MASSACHUSETTS
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10/02/2017	Appeal: notice of assembly of record sent to Counsel and the Appeals Court	
10/02/2017	Appeal: Statement of the Case on Appeal (Cover Sheet).Defendant Applies To: Stanton, Clerk, Hon. Joseph (Other interested party); McKenna, Esq., James Philip (Attorney) on behalf of Escobar, Justino (Defendant); Zanini, Esq., John P (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)	
10/02/2017	Appeal: notice of assembly of record sent to Counsel and the Appeals Court	
10/02/2017	Appeal: Statement of the Case on Appeal (Cover Sheet).	
10/04/2017	CD of Transcript of 08/17/2017 09:00 AM Motion Hearing received from Nancy King. (CD taken over to appeals court on this day)	
10/06/2017	68	Notice of docket entry received from Supreme Judicial Court Case was entered in this court on October 2, 2017
10/06/2017	69	Notice of docket entry received from Supreme Judicial Court Case was entered in this court on October 2, 2017

*I hereby certify that the foregoing is a true copy of the record of the Superior Court
Department of the Trial Court for the Transaction of Criminal Business, Suffolk County.*

*I hereunto set my hand and affix the seal of said Superior Court, at
Boston aforesaid, this
Eighteenth Day of October in the Year of
Our Lord Two Thousand Seventeen.*



J.B.
Assistant Clerk Magistrate

SUCR 2009-10059

Commonwealth of Massachusetts

VS

Justino Escobar

G.L. Chapter 258, Section 3. To provide victims a meaningful role in the criminal justice system, victims and witnesses of crime, or in the event the victim is deceased, the family members of the victim, shall be afforded the following basic and fundamental rights, to the greatest extent possible and subject to appropriation and to available resources, with priority for services to be provided to victims of crimes against the person and crimes where physical injury to a person results:

- (a) for victims, to be informed by the prosecutor about the victim's rights in the criminal process, including but not limited to the rights provided under this chapter. At the beginning of the criminal justice process, the prosecutor shall provide an explanation to the victim of how a case progresses through the criminal justice system, what the victim's role is in the process, what the system may expect from the victim, why the system requires this, and, if the victim requests, the prosecutor shall periodically apprise the victim of significant developments in the case;
- (b) for victims and family members, to be present at all court proceedings related to the offense committed against the victim, unless the victim or family member is to testify and the court determines that the person's testimony would be materially affected by hearing other testimony at trial and orders the person to be excluded from the courtroom during certain other testimony;
- (c) for victims and witnesses, to be notified by the prosecutor, in a timely manner, when a court proceeding to which they have been summoned will not go on as scheduled, provided that such changes are known in advance. In order to notify victims and witnesses, a form shall be provided to them by the prosecutor for the purpose of maintaining a current telephone number and address. The victim or witness shall thereafter maintain with the prosecutor a current telephone number and address;
- (d) for victims and witnesses, to be provided with information by the prosecutor as to the level of protection available and to receive protection from the local law enforcement agencies from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts;
- (e) for victims, to be informed by the prosecutor of financial assistance and other social services available to victims, including information relative to applying for such assistance or services;
- (f) for victims and witnesses, to a prompt disposition of the case in which they are involved as a victim or a witness;

(g) for victims, to confer with the prosecutor before the commencement of the trial, before any hearing on motions by the defense to obtain psychiatric or other confidential records, and before the filing of a nolle prosequi or other act by the commonwealth terminating the prosecution or before the submission of the commonwealth's proposed sentence recommendation to the court. The prosecutor shall inform the court of the victim's position, if known, regarding the prosecutor's sentence recommendation. The right of the victim to confer with the prosecutor does not include the authority to direct the prosecution of the case;

(h) for victims and witnesses, to be informed of the right to request confidentiality in the criminal justice system. Upon the court's approval of such request, no law enforcement agency, prosecutor, defense counsel, or parole, probation or corrections official may disclose or state in open court, except among themselves, the residential address, telephone number, or place of employment or school of the victim, a victim's family member, or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses;

(i) for victims, family members and witnesses to be provided, by the court as provided in section 17 of chapter 211B, with a secure waiting area or room which is separate from the waiting area of the defendant or the defendant's family, friends, attorneys or witnesses and separate from the district attorney's office; provided, however, that the court shall designate a waiting area at each courthouse; and provided further, that designation of those areas shall be made in accordance with the implementation plan developed by the task force.

(j) for victims and witnesses, to be informed by the court and the prosecutor of procedures to be followed in order to apply for and receive any witness fee to which they are entitled;

(k) for victims and witnesses, to be provided, where appropriate, with employer and creditor intercession services by the prosecutor to seek employer cooperation in minimizing employees' loss of pay and other benefits resulting from their participation in the criminal justice process, and to seek consideration from creditors if the victim is unable, temporarily, to continue payments;

(l) for victims or witnesses who have received a subpoena to testify, to be free from discharge or penalty or threat of discharge or penalty by his employer by reason of his attendance as a witness at a criminal proceeding. A victim or witness who notifies his employer of his subpoena to appear as a witness prior to his attendance, shall not on account of his absence from employment by reason of such witness service be subject to discharge or penalty by his employer. Any employer or agent of said employer who discharges or disciplines or continues to threaten to discharge or discipline a victim or witness because that victim or witness is subpoenaed to attend court for the purpose of giving testimony may be subject to the sanctions stated in section fourteen A of chapter two hundred and sixty-eight;

(m) for victims and witnesses, to be informed of the right to submit to or decline an interview by defense counsel or anyone acting on the defendant's behalf, except when responding to lawful process, and, if the victim or witness decides to submit to an interview, the right to impose reasonable conditions on the conduct of the interview;

(n) for victims, to confer with the probation officer prior to the filing of the full presentence report. If the victim is not available or declines to confer, the probation officer shall record that information in the report. If the probation officer is not able to confer with the victim or the victim declines to confer, the probation officer shall note in the full presentence report the reason why the probation officer did not make contact with the victim;

(o) for victims, to request that restitution be an element of the final disposition of a case and to obtain assistance from the prosecutor in the documentation of the victim's losses. If restitution is ordered as part of a case disposition, the victim has the right to receive from the probation department a copy of the schedule of restitution payments and the name and telephone number of the probation officer or other official who is responsible for supervising the defendant's payments. If the offender seeks to modify the restitution order, the offender's supervising probation officer shall provide notice to the victim and the victim shall have the right to be heard at any hearing relative to the proposed modification.

(p) for victims, to be heard through an oral and written victim impact statement at sentencing or the disposition of the case against the defendant about the effects of the crime on the victim and as to a recommended sentence, pursuant to section four B of chapter two hundred and seventy-nine, and to be heard at any other time deemed appropriate by the court. The victim also has a right to submit the victim impact statement to the parole board for inclusion in its records regarding the perpetrator of the crime;

- (q) for victims, to be informed by the prosecutor of the final disposition of the case, including, where applicable, an explanation of the type of sentence imposed by the court and a copy of the court order setting forth the conditions of probation or other supervised or unsupervised release within thirty days of establishing the conditions, with the name and telephone number of the probation officer, if any, assigned to the defendant;
- (r) for victims, to have any personal property that was stolen or taken for evidentiary purposes, except contraband, property subject to evidentiary analysis, and property the ownership of which is disputed, returned by the court, the prosecutor or law enforcement agencies within ten days of its taking or recovery if it is not needed for law enforcement or prosecution purposes or as expeditiously as possible when said property is no longer needed for law enforcement or prosecution purposes;
- (s) for victims, to be informed by the parole board of information regarding the defendant's parole eligibility and status in the criminal justice system;
- (t) for victims, to be informed in advance by the appropriate custodial authority whenever the defendant receives a temporary, provisional or final release from custody, whenever a defendant is moved from a secure facility to a less-secure facility, and whenever the defendant escapes from custody. The victim shall be informed by the prosecutor about notification rights and the certification process required to access the criminal offender record information files. Persons requesting such notice must provide the appropriate authority with current information as to their address and telephone number;
- (u) for victims, to be informed that the victim may have a right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim.
- (v) for one family member of a victim of a homicide, which the matter before the court is related, to possess in the courtroom a photograph, that is not of itself of an inflammatory nature, of the deceased victim that is not larger than eight by ten inches; provided, however, that at no time may the photograph be exposed or in anyway displayed in the presence of any member of the jury, or the jury pool from which a jury is to be selected in a particular matter; provided, further, that nothing in this section shall preclude the admission into evidence of a photograph that the court deems relevant and material.

(w) Where the victim or witness is an employee of the department of youth services, no law enforcement agency, prosecutor, defense counsel or parole, probation or corrections official shall disclose or state the residential address, telephone number or place of employment or school of the victim, a victim's family member or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses.

There shall be conspicuously posted in all courthouses and police stations a summary of the rights afforded under this section. The victim and witness assistance board, pursuant to section 4, shall devise and provide posters to satisfy this requirement to court officials and police station personnel, and, upon request and at the discretion of the office and board, to any other institution or organization to post and maintain in space accessible to the general public. The board shall develop such posters in a variety of languages as determined by the Massachusetts office for victim assistance. Upon request, the board will respond, to the extent possible, to any requests for additional language translations of such posters.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Appeals Court No. 2017-P-1287.

COMMONWEALTH)
)
v.) CERTIFICATION OF
)
)
JUSTINO ESCOBAR) COMPLIANCE.
)

Now comes appellate counsel for Mr. Escobar and, pursuant to Mass. R. A. P. 16(k), respectfully certifies that the foregoing application 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,

/s/ James P. McKenna

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October 19, 2017

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Appeals Court No. 2017-P-1287.

SUFFOLK COUNTY.

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

JUSTINO ESCOBAR,
Appellant.

**Application for Direct Appellate Review
of Appellant,
Justino Escobar.**

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK COUNTY.

Appeals Court No. 2017-P-1287.

COMMONWEALTH)
)
)
v.) CERTIFICATE OF SERVICE.
)
)
JUSTINO ESCOBAR)

Now comes James P. McKenna, appellate counsel for Mr. Escobar, and respectfully certifies that Assistant District Attorney John P. Zanini, Esquire, counsel for the Appellee, the Commonwealth, has registered for efileMA, and so will receive a copy of the attached Application for Direct Appellate Review by means of that system (via <https://efilema.tylerhost.net/ofsweb>) this Nineteenth day of October, 2017.

Respectfully signed under the pains and penalties of perjury this Nineteenth day of October, 2017,

/s/ James P. McKenna

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October 19, 2017