COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, SS. NO. SJC-11465

COMMONWEALTH
Appellant

V.

RAKIM D. SCOTT
Defendant/Appellee

ON APPEAL FROM A JUDGMENT OF
THE BOSTON MUNICIPAL COURT

BRIEF
OF THE DEFENDANT/APPELLEE

FOR THE DEFENDANT:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Ex Parte Junius Sereal,
AP-76,972 (3/16/13) 36

United States Constitution

Massachusetts Declaration of Rights

Massachusetts General Laws

Other Authorities

ISSUES

I. Did the district court judge properly exercise his discretion in allowing Scott's Rule 30(b) motion where he noted on the record the chemist who tested the drug evidence was under indictment for mismanagement of such evidence, where he was further informed by counsel on the record the indictment against the chemist additionally charged her with insuring positive results and falsifying drug analysis findings, and the original motion papers allege the chemist was known by law enforcement to:
   a. intentionally contaminate drug evidence to insure positive results;
   b. inflate sample weights;
   c. falsify drug analysis findings; and
   d. fraudulently alter chain of custody documents

during the time period relevant to this case?

II. Does Article 12 require the Commonwealth produce evidence of the nature at issue here, which is material and exculpatory and not merely impeaching, irrespective of its actual knowledge of such evidence, as it tends to negate the guilt of the accused and where state lab chemists are part of the prosecution team?

III. Should this Court exercise its superintendence authority and provide an expeditious, global solution to the Dookhan/Hinton Lab crisis?

IV. If this Court is not inclined to issue a far-reaching decision to address the Dookhan/Hinton Lab cases, relying upon well-settled, time-honored Rule 30 jurisprudence alone, must it find the judge properly and reasonably exercised his discretion in granting Scott's Rule 30 motion?

STATEMENT OF THE CASE

On 4/5/11 a Boston Municipal Court[1] complaint issued charging Rakim Scott with a single count of

[1] The ADA erroneously states the complaint issued from Dorchester District Court C.Br.1, as its brief here is a reincarnation of its brief in Commonwealth v. Corey Bjork, SJC-11464, originating out of that court.

possession of a class B controlled substance. R.1[2] On 6/10/11 Annie Dookhan, the primary chemist at the Hinton State Laboratory (HSL) charged with analyzing the substance submitted for testing, generated a drug certification claiming the substance was cocaine. R.9

Scott admitted to sufficient facts on 9/20/11 in front of The Honorable Justice Michael Coyne and the case was continued without a finding for a year. T1.1-10;SR.64-73 On 12/7/12 Scott filed a motion to withdraw his plea supported by an affidavit of counsel indicating he had learned of the scandal alleging widespread tampering and falsification of drug evidence on the part of Dookhan, as well as a Brady violation related thereto. R.12-13

The ADA filed an opposition at the first hearing on 1/4/13. R.15-31;T2.2;SR.46-56 A second hearing was held 1/25/13 T2.1-7;SR.57-63, and the judge allowed the motion over objection. T3.4

The ADA filed a notice of appeal 2/20/13 R.34, a brief in the Appeals Court 4/26/13, and an Application for Direct Appellate Review 4/30/13. In support of that application, he filed a 94-page record appendix containing documents relating specifically to this

[2] References: Commonwealth's record appendix-R.[pg.]; transcript of the 9/20/11 plea proceeding-T1.[pg.]; transcript of the 1/4/13 hearing-T2.[pg.]; transcript of the 1/25/13 hearing-T3.[pg.] The plea transcript was obtained by Scott and is included in a supplemental record appendix herein-SR.[pg.]

case and 3 companion cases. The record appendix included a compact disk containing hundreds of pages relating to the State Police investigation of Dookhan.[3] On 5/29/13, this Court granted the application.

STATEMENT OF FACTS

The admission to sufficient facts

On 9/20/11 Scott admitted to sufficient facts and received a continuance without a finding (CWOF) for a year under docket 11CR22221. He received a probation term concurrent with a probation term he was then serving. As part of the factual predicate supporting the admission, the ADA stated the police found Scott loitering and checked him for warrants and found he had an outstanding district court warrant. When he was taken into custody and searched, 5 small baggies of

[3] The appellant in a companion case, Commonwealth v. Rodriquez, SJC-11462 submitted a subset of these documents referred to as the HRA "Hinton Lab Record Appendix". Given: 1) this Court's acknowledgment of the HRA contents in Commonwealth v. Charles, 466 Mass. 63, 64-65 (2013); 2) the Commonwealth's prior use of HRA documents to forward its own position in this case; and 3) the plea judge's acknowledgment of his awareness of the existence of this information, widely distributed to members of the bench and bar T2.4-7, this Court can take judicial notice of the contents of the HRA pursuant to Mass. Guide to Evidence §201. See Issue I(A)(2) *infra* for a detailed analysis of why judicial notice can be taken by this Court in this case. In an effort to consolidate and simplify the record and reduce the copying cost to taxpayers in appointed cases in the Hinton Lab scandal appeals joined by this Court, several appellees, including Scott, have filed a joint motion asking the Court for leave to cite to Rodriguez's HRA. Accordingly, Scott will cite to the HRA where appropriate.

alleged crack cocaine were removed. T1.1-10

On 6/10/11 primary chemist Dookhan analyzed the contents of those baggies at the HSL. She created a drug certification claiming the substance was cocaine. R.9

Motion to withdraw the admission to sufficient facts

On 12/7/12 Scott filed a motion to vacate the CWOF, as the drug certificate reflected Dookhan performed the testing. The motion papers note Dookhan "has been identified by law enforcement officials as a person who intentionally contaminated drug evidence to ensure positive tests, inflated sample weights, falsified drug analysis findings, and fraudulently altered chain of custody documents during a time period relevant to this case, [and] [a]s a result of the investigation, two laboratory supervisors were suspended, and the [HSL] was closed down." R.12-13

In arguing his admission to sufficient facts was involuntary, Scott notes the misconduct of Dookhan is imputed to the Commonwealth. He notes he was deprived of due process by the ADA's failure to provide true and accurate discovery before his admission and alleges Dookhan's misconduct constitutes newly discovered exculpatory evidence. R.12-13

Scott's motion is supported by counsel's affidavit. It requests a new trial, and permission to

supplement the motion with additional material to be uncovered by further HSL investigation and discovery received from the government. She states:

> The Commonwealth has acknowledged in the media, as well as in open court in other cases… Dookhan was fired and is currently under investigation for serious improprieties at the lab, including inflating drug weights, contaminating drug samples to ensure positive results, and falsifying findings…. Dookhan's drug analysis certificates are rendered suspect in that she has been accused by law enforcement officials of falsifying the weight and content of the samples. Attached is a copy of the police incident report and supplemental report filed with this court. R.14

Commonwealth's opposition to the motion

The ADA filed an extensive 17-page opposition acknowledging the evidence to support the single charge of possession of a controlled substance against Scott consists solely of a drug certification from primary chemist Dookhan. He argued Scott waived the right to challenge the factual basis of his plea by entering it, claiming the "new evidence" of Dookhan's widespread felonious tampering with drug evidence "related only to the circumstances surrounding the offense and not to the intelligence or volition of his plea," and therefore was "simply irrelevant." R.20-21

The ADA claims Scott proposes "he should be able to admit in open court that he is in fact guilty of the offenses with which he is charged and then later

claim factual innocence." He complains if the judge grants the motion, he rewards perjury by permitting Scott to engage in judicially-endorsed gamesmanship, and expresses concern about compromising the integrity of the criminal justice system by giving Scott his plea back simply because the evidence pointing to his guilt is newly discovered to be unreliable. R.21

Yet the ADA acknowledges Scott was induced plead guilty due to the representation of the strength of the evidence against him. The ADA then casts Dookhan's falsifying of drug evidence and tampering with drug samples as mere "credibility problems" amounting to a "possible challenge to the credibility of a government witness," noting impeachment testimony of witnesses does not "ordinarily" warrant a new trial. He claims Scott's sole use of the evidence would be to test "the purity of principle [and] the skill accuracy and judgment" of Dookhan. R.22-24 & n.4,27,29

The ADA additionally argued Scott "waived his right to receive exculpatory evidence by his tender of plea" claimed he "did not suppress exculpatory evidence," and announced when a defendant pleads guilty, he forfeits his right to later claim a deprivation of constitutional rights that occurred prior to the plea's entry. He concludes a plea renders a Brady violation "moot." R.25-27

Finally, the ADA argues Dookhan was not a part of the prosecution team, and the exculpatory information was squirreled away within the "mind" of Dookhan where it could not be accessed. R.30

The first hearing on the motion

On 1/4/13 the judge heard from the parties, noting on the record his awareness Dookhan "is now under indictment for allegations of mismanagement, whether it was intentional or negligent, of drug evidence at the Hinton Lab, right?" Scott's counsel confirmed this on the record, and expanded the list of offenses included in Dookhan's indictment for the court's edification: 1) insuring positive test results; and 2) falsifying drug analysis findings. The ADA did not dispute the contents of the indictment. Counsel then noted there is "a question whether or not, in fact, the controlled substance is what they're suggesting it to be at this point." The ADA complained there is no affidavit from Scott, and counsel's affidavit is insufficient, and argued Brady rights are trial rights Scott forfeited. T2.4-5

The ADA urged the Court to ignore "what happened at some future date at the lab, because that's really irrelevant." He opined the focus should be Scott testified and admitted to the facts of this case. T2.6

The judge queried, "do you think maybe he did that because of the strength of the Commonwealth's case and the evidence that was presented by certification from the lab? Do you think that could have had a bearing on his plea?" The ADA replied, "I think it probably did, Your Honor," and then he announced, "the case law is quite clear that that is not grounds to vacate a plea." The judge took the matter under advisement, stated he would review the respective pleadings from both sides, and he hoped to have a decision by the end of the following week. T2.6-7

The second hearing on the motion and decision

On 1/25/13 a second hearing was held, as the judge took the matter under advisement following 1/4/13 argument and submission of memoranda. The judge allowed Scott's motion over objection. T3.1-7

Commonwealth's brief and the appellate record

The ADA filed a brief without the entire record of proceedings.[4] The plea transcript was not produced and there was no stipulation it was unnecessary.[5] The judge based his decision on the entire record below, including evidence from the motion hearings, which go

[4] The composition of the record on appeal in all cases consists of "[t]he original papers and exhibits on file and the transcript of proceedings, if any…." Mass. R. App. Pro. 8(a).
[5] See Mass. R. App. Pro. 8(b)(2).

unmentioned by the ADA. Scott includes all transcripts in his supplemental record appendix.[6]

The Hinton Drug Lab Scandal

Prior to July 2012, the HSL was under the guidance of the Department of Public Health (DPH). HRA.107 It fulfilled DPH's statutory mandate to perform chemical analyses of drug samples seized by law enforcement, although it lacked national accreditation. See G.L. c. 111, §12. HRA.74

When the legislature directed the State Police (police) to take control of the HSL, an incident involving Dookhan surfaced. In June 2011 she improperly accessed 90 drug samples and forged an Evidence Log Book. A DPH internal investigation concluded Dookhan "failed to follow Lab protocols for the transfer and documentation of samples for testing, and subsequently, created a false record of said transfers." On 6/21/11 Dookhan was barred from testing samples and was "allowed to resign" in March 2012. In August 2012, police from the Attorney General's (AG) Office became involved. HRA.78-80,175-80

On 8/28/12 State Police Detective Lieutenant Robert M. Irwin interviewed Dookhan. HRA.44-47

[6]The ADA references a 1/31/13 oral argument C.Br.3 that did not take place, and cites a non-existent transcript and an irrelevant portion of the record appendix. No such hearing took place in this case.

Approximately 2 days later, Governor Deval Patrick "shut the lab down." HRA.72,198

A. The Testing Process

The "primary chemist" was the chemist to whom samples from the Lab's evidence office were initially assigned. She maintained custody of the sample in her own locker during the testing. She was responsible for determining the gross and net weight of the sample, performed preliminary testing, made up a vial using a small amount of the substance and a solvent, and sent the vial with a "control sheet" containing the preliminary test results to the "confirmatory chemist" for confirmatory gas chromatography-mass spectrometer (GC-MS) testing. The preliminary testing had only "moderate discriminatory power" and no documentation was generated beyond a "work card" filled out by the primary chemist. The accuracy could only be confirmed by repeating the test. HRA.75-77,216,334

B. Dookhan's Admissions of Wrongdoing

During her interview with Irwin, Dookhan admitted to improperly removing 90 samples from the evidence safe in June 2011 and then falsifying the evidence log book to cover it up. She also admitted to: 1) forging the initials of another chemist on a report certifying the GC-MS machine used by her lab was functioning properly in June 2011; 2) and making up data showing

that the machine was properly functioning in May 2011. Dookhan had access to the evidence database, and admitted to accessing it improperly. HRA.44-45

Dookhan initially denied any improper testing. When challenged, she eventually admitted to "dry labbing… when a chemist looks at a sample and identifies it by sight instead of doing the proper testing… then states they did all the work they were required to do, but really they 'dry labbed'." Dookhan told Irwin she would lay out about 25 samples of the same suspected type of drug and properly test about 5, and those she did not properly test she labeled as the drug she suspected it was. HRA.46

> Dookhan stated that she properly tested all of the unknowns, because she had no idea what they were. She would then submit all the samples to mass/spec for confirmatory analysis. On occasion the samples would be returned from mass/spec because the drug was different from what she had said it was. She would initially try to "clean the sample up" by making a more concentrated sample or using more of the sample. If that did not work, she would intentionally "contaminate" the sample by preparing a vial using a known drug from a completed test stored at her bench. She stated that she "only contaminated samples a few times." Dookhan did not want samples sent back from mass/spec to remain improperly typed, as it would show that she had not completed the required preliminary tests on all the samples she sent to mass/spec. Dookhan explained that she did what she did in order to get more work done. Id. (emphasis added).

Dookhan admitted prior to her June 2011 removal, she "dry labbed" for 2-3 years. Other chemists

retested samples Dookhan handled as primary chemist and confirmed they tested negative.[7] HRA.46,125-26,130-31,135-36,262-70

C. Dookhan's Unauthorized Access to the Lab and Questionable Lab Habits

Dookhan told police her key did not open the evidence safe, but when it was checked, it opened the door. Dookhan's key worked on the door lock until it was changed in December 2011. HRA.45,82,154-56

Dookhan's co-workers questioned her habits. Dan Renczkowski, HSL chemist since October 2005, noted she created a danger of sample cross-contamination by often having many mass/spec vials open and uncapped on her racks. As a primary chemist, she forged his initials on a control sheet, bypassing checks and balances to safeguard against mistakes. HRA.3,222

Michael Lawler, HSL chemist and employee since 1994, found Dookhan's production numbers inconsistent with the number of samples she could properly test, and she was not discarding enough slides in the course of her preliminary testing. HRA.13-14

Supervisor Peter Piro, with HSL since 1991, was concerned although the cocaine test required Dookhan to perform a micro-crystal test with a microscope, he never saw her in front of a microscope. He saw her

[7] Dookhan tested the substances in this case 6/10/11, at the height of this scandal.

bring many racks of vials to the mass/spec machine day after day, and did not believe she could "do those numbers correctly." He confronted her about starting work without checking her scale balance. HRA.16-18

Chemist Hevis Lleshi never saw Dookhan do a balance check on her scale, and questioned why she could open and close the lab, as "Chemist II" like Dookhan was not supposed to do this. Dookhan had "a lot of privileges" a Chemist II should not have: she knew the evidence safe code, looked up lab numbers in the database, received evidence, went to training seminars and had access to grants. Co-workers thought Dookhan had "her run of the place." HRA.26-28

Daniela Frasca, HSL chemist since 2001, stated Dookhan knew the code to the HSL alarm allowing her access in the mornings. She does not recall seeing Dookhan balance her scale, noted Dookhan got calls on her cell phone from ADAs, which was unusual because other chemists did not get such calls. HRA.36-37

Stacy Desjardins, HSL chemist from March 2009-February 2011, stated she "busted her ass to get samples done and always wondered how Dookhan was beating her." Gerald Giguere, a former employee of the drug laboratory in Amherst, advised police although there were no official incentives to test more samples

per month, a chemist who analyzed more samples would likely be considered for promotion. HRA.41,43

D. Systemic Problems at the Lab

The DPH investigation found lax HSL safeguards allowed Dookhan to act as a rogue employee and "maliciously manipulate" the testing and documentation process with minimized chance of discovery. There were insufficient controls on evidence room access, no camera surveillance, no system to detect poor quality testing, lack of close supervision and oversight, lack of specialized quality control oversight and poor judgment in response to protocol violations. HRA.81-84

E. Dookhan's Testing Volumes

Dookhan was hired at HSL in November 2003 as a "Chemist 1". She received a promotion to "Chemist 2" in 2005. Throughout her employment, she maintained an "unusually high volume of testing." She was assigned more samples to test than any other chemist, "exceeding her peers by as much as 50% more than the second highest chemist." From 1/1/04-12/31/11 Dookhan was assigned 25.3% of all analyses in the Lab and completed 21.8% of all tests conducted. HRA.77,82-83

F. Dookhan's History of Lying and her Relationship with Suffolk County ADAs

When hired, Dookhan submitted a resume showing she was enrolled at the University of Massachusetts at Boston (UMass Boston) studying for a Master of Science

in Chemistry. She was never so enrolled, nor did she ever receive a UMass Boston master's degree. In May 2010, she testified in court to having received a master's of science degree in chemistry at UMass Boston. She lied on her resume about having earned a master's degree until January 2012. HRA.114,206,208-09,290-91,333

During her employment, Dookhan had frequent email contact with Suffolk County ADAs, a sample of which is included in the HRA. HRA.157-71 These emails reveal Suffolk ADAs regarded her as a valued colleague and team member:

- On 3/25/09, ADA Jeremy Bucci, Chief of Narcotics & Asset Forfeiture Unit, wrote to Dookhan thanking her for her help on a case and stating "I appreciate how easy you made my job by doing your job so well." HRA.157
- On 12/12/09 Bucci wrote asking if he could use her email explanation of marijuana testing "to help educate the younger ADAs" and sharing the "good news" the "bad guy in this case has agreed to 15 years".[8] HRA.158
- On 2/11/11, ADA Gregory Henning wrote to Dookhan telling her another ADA, Patrick Devlin would buy her a sandwich to celebrate "dodging the case" by taking a plea. HRA.159 ADA Devlin wrote to Dookhan that he didn't want ADA Henning "to steal you as a witness." HRA.159
- On 4/28/11, Dookhan wrote to ADA Ryan Mingo asking him to "[m]ake it go away," referring

[8] Dookhan bragged to ADA George Papachristos that Bucci was "more than happy" to "hand over files" to her so that she could "bump up a case federally." See note 13 *infra* at p.40 and SR.83. Bucci holds a supervisory position in the Suffolk County DA's Office. HRA.157-58

to his case on which she was summonsed. On 5/3/11, ADA Mingo responds, "All pleas. You're off the hook. Ryan". HRA.161

- On 10/3/11, ADA Matthew Feeney wrote to her, "Thanks so much Annie. I'd say that I owe you one, but at this point, it's more like owing you for about twenty different things." HRA.163

- On 2/9/12 she wrote to ADA Benjamin Megrian thanking him "for being sooo accommodating with us and for providing a ride to BMC for me. (Even Bucci could not get me a ride to court with blue lights and siren… haha)" HRA.170

Dookhan's 6/10/09 email to an Assistant U.S. Attorney reveals her attitude towards defendants was: "get them off the streets." HRA.171a

On 12/1/12 a Suffolk County Grand Jury indicted Dookhan as follows:

- 10 counts of tampering with evidence in violation of G.L. c. 268, §13E for her actions between November 2010 and June 2011.

- 1 count of perjury in violation of G.L. c. 268, §1 for making false statements during a trial held 8/17/10.

- 1 count of falsely pretending to be a graduate of UMass Boston between 5/18/09 and 1/24/12 in violation of G.L. c. 266, §89.

- 5 counts of obstruction of justice in violation of G.L. c. 268, §13B between May 2009 and July 2011. HRA.124-53

This Court has summarized the situation as follows: "It is undisputed that the allegations of serious and far-reaching misconduct by Dookhan at the Hinton drug lab have raised significant concerns about the administration of justice in criminal cases where

a defendant has been convicted of a drug offense and the drugs at issue were analyzed at that facility." Commonwealth v. Charles, 466 Mass. 63, 89 (2013).

SUMMARY OF THE ARGUMENT

1) The motion judge properly exercised his discretion pursuant to Mass. Rule of Crim. Pro. 30 and allowed Scott's motion after careful consideration of the entire sufficient record before him, as he determined justice was not served. pp.18-26 The judge's decision may also be affirmed on 3 independent grounds:
   (a) Scott's plea was involuntary; pp. 26-33
   (b) Dookhan's misconduct is newly discovered evidence casting real doubt on the justice of the conviction; pp.33-37 and
   (c) evidence of Dookhan's misconduct was material exculpatory evidence the ADA failed to provide prior to his plea in violation of due process under Brady v. Maryland. pp.37-43

2) This Court should require the Commonwealth to produce evidence if the nature at issue here, which is material and exculpatory and not merely impeaching, irrespective of whether is known to a

prosecutor, as Article 12 provides greater protections to the accused than the U.S. Constitution. pp.43-44

3) This Court should exercise its G.L. c. 211, §3 superintendence power to provide a timely and systemic remedy to the Dookhan/Hinton Lab scandal. pp.45-47

4) If this Court is not inclined to order a global remedy to address the wide-spread injustices caused by the Dookhan/Hinton Lab scandal, it still should find on this record and these facts, the judge reasonably and properly exercised his discretion in allowing Scott's Rule 30 motion. pp.47-50

ARGUMENT

I. THE HEARING JUDGE PROPERLY EXERCISED HIS BROAD DISCRETION IN GRANTING SCOTT'S RULE 30 MOTION.

A judge has the authority to grant a motion to withdraw a plea whenever it appears to him "justice may not have been done." Mass. R. Crim. P. 30(b), see Commonwealth v. Conaghan, 433 Mass. 105, 106 (2000). The motion may be decided "solely on the submitted affidavits, and the weight and credibility to be accorded those affidavits are within the judge's

discretion." Commonwealth v. Furr, 454 Mass. 101, 101 (2009)(citation omitted).

"The motion is addressed to the sound discretion of the judge… and his disposition of the motion will not be reversed for abuse of discretion unless it is manifestly unjust." Commonwealth v. Correa, 43 Mass. App. Ct. 714, 716 (1997)(citation omitted). Reversal for abuse of discretion is "extremely rare," Commonwealth v. Clemente, 452 Mass. 295, 304 (2008), a demanding standard typically requiring a reviewing court to conclude "no conscientious judge, acting intelligently, could honestly have taken the view expressed by him." Commonwealth v. Lahey, 80 Mass. App. Ct. 606, 615 (2011)(citation omitted).

A Rule 30 motion "responds to the need," even many years following a conviction, to redress "the possibility of error and of grave and lingering injustice." Commonwealth v. Amireault, 424 Mass. 618, 637 (1997). No specific grounds need be alleged, and judges not take a formulaic approach. They need only find justice may not have been served, and articulate a reason or reasons as to why that is true. See, e.g., Commonwealth v. Gagliardi, 21 Mass. App. Ct. 439, 448 (1986)("the judge's decision was not focused on what the Commonwealth did or failed to do; rather, the judge's focus was on the sole issue whether justice

may not have been done, for whatever reason") and Commonwealth v. McCarthy, 375 Mass. 409, 414-15 & n.5 (1978)(proper exercise of judicial discretion "necessarily includes the flexibility to consider the case as a whole, to assess the weight of the evidence, and to bring the interest of justice to bear").

This Court appreciates "[t]he magnitude of the allegations of serious and far-reaching conduct by Dookhan at the Hinton drug lab cannot be overstated. The alleged misconduct may have compromised thousands of cases." Commonwealth v. Charles, 466 Mass. at 74. In light of this recognition, this Court should correspondingly find it is a proper exercise of the broad discretion afforded a judge pursuant to Mass. R. Crim. P. 30(b) to allow a motion to withdraw a plea where Dookhan was the primary chemist who tested the drugs, on grounds justice may not have been served.

A. The record contains evidence supporting the judge's decision to order a new trial.

This Court's "task is only to ensure that there exists in the record… evidence to support the judge's decision to order a new trial." Commonwealth v. Pring-Wilson, 448 Mass. 718, 732 (2007)(citation omitted).

1. In arguing the judge abused his discretion in granting Scott's motion, the ADA has failed to provide an accurate and complete record of the evidence before the court on the motion.

The ADA seems to suggest Scott's motion rises and falls on the 4 corners of the Rule 30 motion papers alone, as if there is legal significance to subscribe to the form of the papers viewed in isolation akin to what the law requires for sufficiency of search warrant allegations see Commonwealth v. O'Day, 440 Mass. 296, 297 (2003) or sufficiency of a complaint under Mass. R. Civ. P. 12(b)(6). C.Br.3-4. The record here consists of far more than the contents of the Rule 30 motion papers, and the judge thoughtfully considered all evidence from the hearings.

The ADA provides an incomplete accounting of what was before the judge when he ruled on the motion by failing to disclose the contents of the hearing transcripts. The only transcript the ADA does reference is from a different case altogether. C.Br.3

The motion judge stated the basis for his ruling on the record. He noted his awareness Dookhan "is now under indictment for allegations of mismanagement, whether it was intentional or negligent, of drug evidence at the Hinton Lab," counsel confirmed on the record this was in fact the case, and she expanded the list of offenses included in the indictment for the court's edification: 1) insuring positive test results; and 2) falsifying drug analysis findings. The ADA did not dispute the representations regarding the

indictment. Counsel noted there is "a question whether or not, in fact, the controlled substance is what they're suggesting it to be at this point." T2.4

2. The plea judge properly took judicial notice of the existence and contents of the indictment against Dookhan and the information regarding the HSL investigation contained in the motion papers in ruling on Scott's Rule 30 motion.

The judge was entitled to take judicial notice of the law enforcement investigation into Dookhan and the HSL, as well as the existence and content of Dookhan's indictment, and factor this information into his decision on whether the ends of justice would be served by granting Scott's Rule 30 motion. The fact of the 12/1/12 indictment, issued approximately a month before the 1/4/13 hearing here, was so notorious and incontrovertible in the MA legal community it is proper to judicially notice it, as "a judge may take judicial notice of facts in connection with records of the court in related actions." Jarosz v. Palmer, 436 Mass. 526, 530 (2002) (citation omitted). See also P.J. Liacos, MA Evidence §2.8.1, at 26 (7th ed. 1999) ("As to… related proceedings, a court may also take judicial notice of the records of other courts")

Historically, this Court is "not inclined towards a narrow and illiberal application of the doctrine of judicial notice." Finlay v. Eastern Racing Ass'n,

Inc., 308 Mass. 20, 27 (1941). Judicial notice has been taken of a prior criminal proceeding related to a disbarment proceeding. See In re Welansky, 319 Mass. 205 (1946) and Gordon v. Gordon, 332 Mass. 210 (1955).

In Stasiukevich v. Nicolls, 168 F.2d 474, 479 (1st Cir. 1948) the court held a judge properly took judicial notice of the existence of an investigation and contents of the related reports, without a finding the reports' contents were indisputable. It was unnecessary for the reports to be formally introduced into evidence, as what was being judicially noticed was simply the existence of the investigation and the findings, without an acceptance of their truth. Id.

So too here, the judge could properly take judicial notice of the existence of the law enforcement investigation into Dookhan and the HSL, as the existence and nature of the allegations alone, and not irrefutable proof of their veracity, formed the basis for the motion. SR.1-4

Further, "[i]t is well-accepted… courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand." Kowalski v. Gange, 914 F.2d 299, 305 (1st Cir. 1990) (judicial notice taken of criminal conviction in wrongful death action), see also E.I. Du Pont de

Nemours & Co. v. Cullen, 791 F.2d 5, 7 (1st Cir. 1986) (judicial notice taken of complaint in state action).

By taking judicial notice of the indictment against Dookhan, what the plea judge did here is akin to what a federal district court judge did in U.S. v. Gordon, 634 F.2d 639, 642 (1st Cir. 1980). There, the First Circuit agreed the judge properly took judicial notice of a federal indictment returned by grand jury in another district, as the fact of that indictment was "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" in accordance with Fed. R. Ev. 201(b).[9]

As in Gordon, the existence and content of the indictment judicially noticed in this case is undisputed by the parties. It therefore was a proper exercise of the judge's discretion to take judicial notice of the existence of the indictment against Dookhan and its contents, and he properly considered that evidence in ruling on Scott's Rule 30 motion.

3. The judge properly considered the ADA's concession that evidence presented by the drug certification in this case "probably" had a bearing on Scott's admission.

The judge asked the ADA, "do you think maybe he [pled guilty in this case] because of the strength of

[9] Proposed Mass. R. Evid. 201(b)-Judicial Notice of Adjudicative Facts is fashioned after Fed. R. Ev. 201(b).

the Commonwealth's case and the evidence that was presented by certification from the lab? Do you think that could have had a bearing on his plea?" The ADA replied, "I think it probably did, Your Honor." T2.6

The ADA's response reflects the common knowledge a drug certificate "assure[s] the fact finder, to a degree that virtually no amount of circumstantial evidence can, that the charged substance is in fact a particular illegal drug." Commonwealth v. Vasquez, 456 Mass. 350, 363-64 (2010). Without the drug certificate, the facts as recited at Scott's plea colloquy are insufficient to establish he possessed crack cocaine as there is no circumstantial evidence at all to support the allegations. Accord Commonwealth v. Charles, 456 Mass. 378, 382 (2010) (circumstantial evidence was not powerful, and could not nullify effect of erroneously admitted drug certificates).

This record is more than sufficient to support the judge's decision that the interests of justice were best served by granting Scott's motion, and how the judge arrived at his decision to do just that is clear from the record. R.12-14;T2.4-7 If there were nothing more to rely upon, this Court is supplied its basis on the trial court record as it stands to uphold the judge's decision on Scott's Rule 30 motion as a proper exercise of judicial discretion. But there is

more.

This Court "is free to affirm a ruling on grounds different from those relied on by the motion judge if the correct or preferred basis for affirmance is supported by the record and the findings." Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 (1997), citing Commonwealth v. Cast, 407 Mass. 891, 897 (1990). Here there are 3 separate bases upon which this Court can affirm the judge's decision.

B. Alternative grounds exist and may serve as a basis for this Court to uphold the judge's decision: 1. the admission to sufficient facts was involuntary; 2) newly discovered evidence casts real doubt upon the justice of the conviction; and 3) exculpatory evidence was withheld from Scott prior to his admission to sufficient facts.

In his Rule 30 motion papers, Scott argues his admission to sufficient facts was not knowing and voluntary, and the misconduct of Dookhan is imputed to the Commonwealth. He notes he was deprived of due process by the ADA's failure to provide true and accurate discovery before he admitted to sufficient facts and points out the misconduct of Dookhan constitutes newly discovered exculpatory evidence. SR.1-3 All of these grounds were therefore put squarely before the motion judge for his consideration.

1. Scott's admission to sufficient facts was involuntary.

Due process requires an admission to sufficient facts be set aside where there is no affirmative showing it was intelligently and voluntarily made. See Commonwealth v. Furr, 454 Mass. 101, 106 (2009) and Commonwealth v. Desrosier, 56 Mass. App. Ct. 348, 354 (2002) ("As a matter of…due process, a guilty plea may be nullified if it does not appear affirmatively… the defendant entered the plea freely and voluntarily.").

"[A] defendant's decision to enter a guilty plea is sometimes influenced by his assessment of the prosecution's case." Ferrara v. U.S., 456 F.3d 278, 291-97 (1st Cir. 2006) citing Brady v. U.S., 397 U.S. 742, 756 (1970). When impermissible conduct causes a defendant to misapprehend the government's case against him, due process is implicated. See id.

Scott concedes his plea colloquy was not facially deficient, he was warned of the usual consequences of pleading guilty, the judge confirmed the plea was knowing and intelligent, and as far as he knew, he was aware of all of his options. T1.3-5 Now, in order to have his plea set aside as involuntary, Scott must demonstrate 2 things:

1) there was some egregiously impermissible conduct prior to his plea; and
2) the misconduct was material to his decision to plead guilty.

In conducting this inquiry, this Court is to examine the totality of the circumstances surrounding

the plea. Id. The inquiry is unrelated to factual guilt or innocence, despite the ADA's assertions.[10] R.21

Egregious impermissible conduct is established, as Dookhan was the primary chemist and she admittedly routinely perjured lab reports and misrepresented drug evidence in numerous cases. The judge was aware of this when he ruled on Scott's Rule 30 motion. R.12-13;T2.4-7

There is also "a reasonable probability that, but for [the misconduct], he would not have pleaded guilty and would have insisted on going to trial." Id. citing Hill v. Lockhart, 474 U.S. 52, 59 (1985). "[A] reasonable probability is a probability sufficient to undermine confidence in a belief that the petitioner would have entered a plea." Id. citing Miller v.

[10] It has been long recognized there are many reasons for pleading guilty other than actual guilt. See North Carolina v. Alford, 400 U.S. 25, 33 (1970). Our criminal justice system is a system of pleas not trials. See Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012). An unreliable drug certificate announcing guilt is inherently coercive of a guilty plea because of the great weight a fact-finder assigns to it. See Commonwealth v. Vasquez, 456 Mass. at 363-64. Allowing an unreliable drug certificate to coerce a guilty plea and then holding out the plea as evidence a defendant actually possessed illegal drugs is unfair and is not due process. See Napue v. Illinois, 360 U.S. 264, 269 (1959)(conviction procured by false evidence "known to be such by representatives of the State" violates due process); see generally Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976)(government action depriving one of liberty must be implemented fairly).

Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988). The reasonable probability test is objective:

> Would a reasonable defendant in Scott's shoes likely have altered his decision to plead guilty had he known of the ADA's inability to establish the substance was crack cocaine in the manner the ADA claimed he could when he represented facts to the court at the time of plea?

See id. (further citations omitted)

This Court must use a "wide-angled lens" to answer this question, and consider the following factors with respect to the tainted evidence:

1) whether it would have detracted from the factual basis used to support the plea, and whether it was useful to impeach a witness whose credibility may have been outcome-determinative;

2) whether it was cumulative of other evidence already in the defendant's possession,

3) whether it would have influenced counsel's recommendation as to the desirability of accepting a particular plea bargain; and

4) whether its value was outweighed by the benefits of the plea agreement.

Id. (further citations omitted).

> While this checklist is useful, experience teaches… each defendant's decision… whether… to enter a guilty plea is personal and, thus, unique. Consequently, the compendium of relevant factors and the comparative weight given to each will vary from case to case. The ultimate aim, common to every case, is to ascertain whether the totality of the circumstances discloses a reasonable probability… the defendant would not have pleaded guilty absent the misconduct.

Id.

When Scott was taken into custody and searched, 5

small baggies of alleged crack cocaine were removed from him. T1.5 The contents were analyzed by primary chemist Dookhan on 6/10/11. She created a drug certification claiming the substance tested was cocaine. R.9 There appeared at the time of plea to be no promising avenue of defense regarding the drug evidence the ADA had against Scott.

Tellingly, even the ADA conceded to the plea judge the lab certificate evidence probably influenced Scott's decision at the time of plea, because it was the certificate that made the case a strong one for the Commonwealth. T2.6-7

In light of the egregious misconduct of Dookhan that has come to light, is well-documented, and was known to the judge at the time of the Rule 30 motion see R.12-14;T2.4-7, there is no question on the specific facts of this case, Scott has met his burden of demonstrating there is a reasonable probability he would not have admitted to sufficient facts if he knew the ADA could not establish the substances tested in his case were cocaine, for there is no other evidence to establish Scott possessed cocaine. Scott made no statements to law enforcement. There were no undercover officers or indicia of narcotics sales involved. Scott had no drug paraphernalia or other circumstantial evidence of narcotics use or

distribution in his possession, there was no buy money involved and there was no field-testing performed. Without the lab analysis report, the ADA had no proof of any crime against Scott.

The ADA claimed he had evidence from the lab confirming the substance at issue was crack cocaine. T2.6-7 There was no realistically successful challenge to mount to Dookhan as a witness against Scott at the time of plea. However, had counsel known the ADA could not prove the case against Scott, she would not have advised Scott to make an admission, as established by the very fact she brought the Rule 30 motion. No competent attorney advises a client to plead guilty when guilt cannot be proven. Therefore, all Ferrara factors are satisfied. See Ferrara v. U.S., 456 F.3d at 291-97.

While a defendant is not entitled to change his guilty plea simply because he miscalculated the strength of the case against him, see Brady v. U.S., 397 U.S. at 757, when that miscalculation is the result of "some particularly pernicious form of impermissible conduct… due process concerns are implicated." Ferrara, 456 F.3d at 291, see id. (in "limited circumstances", the ADA's "failure to disclose evidence may be sufficiently outrageous to constitute the sort of impermissible conduct that is

needed to ground a challenge to the validity of a guilty plea"), citing U.S. v. Bouthot, 878 F.2d 1506, 1511 (1st Cir. 1989) (stating a defendant could attack his guilty plea under Brady v. U.S. by showing the prosecution's failure to provide information constituted a "material omission tantamount to a misrepresentation"). Dookhan's admissions to fraud, evidence tampering, forgery and perjury constitute the precise sort of "egregiously impermissible misconduct" to implicate due process concerns and satisfy the requirements in Ferrara.[11]

"The long-standing test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." U.S. v. Fisher, 711 F.3d 460, 464 (4th Cir. 2013) citing Hill v. Lockhart, 474 U.S. at 56. Scott

[10] A claim under Brady v. U.S. requires a showing of impermissible conduct by a government agent. In this context, Dookhan must be deemed an agent of the prosecution for purposes of a Brady claim. Commonwealth v. Martin, 427 Mass. 816, 823-24 (1998). (a chemist at crime lab was an agent of the prosecution). Cf. Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case"). E-mails between Dookhan and various ADAs illustrate at the very least, she was acting as a Commonwealth agent. These e-mails paint a telling picture: Dookhan viewed herself as a member of the prosecution team and was viewed as such by ADAs. HRA.151-70. See also emails between prosecutors and Dookhan, *supra* at pp.15-16 and *infra* at p.40 n.13 and SR.83-89.

could not intelligently assess and choose among his options where they were obscured by the withholding of evidence of Dookhan's egregious government fraud that was clearly material to his decision.

2. Dookhan's misconduct is newly discovered evidence that casts real doubt on the justice of the conviction.

Newly discovered evidence provides a separate basis to vacate Scott's guilty plea. "A defendant seeking a new trial on the ground of newly discovered evidence must establish… the evidence is newly discovered and that it casts real doubt on the justice of the conviction." Commonwealth v. Grace, 397 Mass. 303, 305 (1986) (citation omitted). Evidence is "newly discovered" if it was "unknown to the defendant or his counsel and not reasonably discoverable by them at the time of [the defendant's admission]." Id. at 306.

Neither Scott nor his attorney knew of Dookhan's misconduct at the time of his admission, nor could they have discovered it prior. As such, evidence of Dookhan's misconduct qualifies as "newly discovered." The only remaining issue is whether the evidence casts doubt on the justice of Scott's conviction. To constitute an appropriate basis for a new trial, newly discovered evidence "not only must be material and credible… but also must carry a measure of strength in support of the defendant's position." Id. at 305

(citations omitted). Newly discovered evidence is material if it is "weighty and of such nature as to its credibility, potency, and pertinency to fundamental issues in the case as to be worthy of careful consideration." Commonwealth v. Brown, 378 Mass. 165, 171 (1979) (citation omitted).

Had this evidence come to light, it would have had a significant impact on Scott's decision to plead guilty. Although evidence of Dookhan's misconduct could certainly have been used to impeach her credibility, particularly the evidence she had falsely testified in at least 4 court cases prior to Scott's plea and she had contaminated samples that had tested negative for controlled substances, it can hardly be said this evidence as a whole is merely impeaching. The facts establishing Dookhan's excessive productivity pattern, falsifying drug tests, dry-labbing from 2009 to 2011 and forging confirmatory chemists' signatures on lab documents raise serious doubts about the accuracy of Scott's drug certificate, which Dookhan signed as the primary chemist. HRA.46,125-26,130-31,135-36,262-70

It is well established, in the analysis of a newly discovered evidence claim, "evidence that is cumulative of evidence admitted at trial tends to carry less weight than evidence that is different in

kind." Grace, 397 Mass. at 305-06. There is no other evidence aside from Dookhan's lab analysis to prove the chemical composition of the substance. Thus, evidence of Dookhan's misconduct is different in kind and has resulted in the ADA's inability to prove the identity the substance recovered.[12] See Commonwealth v. Vasquez, 456 Mass. at 363-64.

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[12] The notion the substance in this or any case with Dookhan as the primary chemist can be "retested," so the Commonwealth may salvage convictions, is untenable. Dookhan tampered with and contaminated an untold number of samples numerous times and has no idea which samples she tainted. Retesting would accomplish nothing, as the integrity of all samples during her HSL tenure is hopelessly compromised. These facts fall well within the Ferrara parameters of "egregious misconduct," given their nature and scope, making this case factually distinguishable from Commonwealth v. Campiti, 41 Mass. App. Ct. 43 (1996) and others cited C.Br.16-19, where there was no nexus between the misconduct and the charges brought. As we have no idea which samples Dookhan tainted, all samples that were under her control are compromised. Her misconduct has a nexus to all of her HSL work. The DA's Office promotes the idea it is fair and just because it nolle prosequied 3 cases where it was conclusively determined Dookhan tainted samples. C.Br.17 n.5 The DA's Office dismissal of such cases should neither be applauded nor admired, for to do otherwise would be legally actionable.

Notably the state of Texas, a state that does not enjoy a reputation for being particularly protective of the rights of the accused (given it has the highest rate of DNA exonerations in the entire country and has actually executed at least one factually innocent man SR.80-82), has instituted this exact remedy to a similar drug lab scandal in that state. Where a Texas drug lab chemist did not follow accepted standards in analyzing evidence, the Court of Criminal Appeals of Texas ruled retesting of drug evidence could not remedy the taint where the drug evidence was at any time in the custody of the analyst in question. The chemist's actions were unreliable, thereby compromising custody, resulting in a due process

This newly discovered evidence would have allowed Scott and his counsel to make an informed decision whether to challenge the accuracy of the drug certificates. See Commonwealth v. Buck, 64 Mass. App. Ct. 760, 765 (2005) (the point is counsel never had the opportunity evaluate the feasibility of a defense based upon this evidence). Dookhan's admitted misconduct from 2009 to 2011, given the testing date in this case of 6/10/11, dispenses with any need for an affidavit from Scott. Counsel's affidavit and the wording of the motion itself make clear the evidence of Dookhan's misconduct would have been central to a defense strategy if known at the time of plea. R.12-14 Compare Commonwealth v. Daniels, 445 Mass. 392, 408-09 (2005)(counsel's affidavit provided prima facie case for relief justifying granting new trial motion as any defense counsel in the circumstances would have made use of newly discovered information which "was the peg on which the defendant's conviction hung or fell").

In any event, the Commonwealth cites to no case (because none exists) stating a judge lacks the authority to grant a Rule 30 motion unless he has in front of him an affidavit from the defendant himself. C.Br.16 Even if Scott had provided his own affidavit,

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violation. See, e.g., Ex Parte Junius Sereal, AP-76,972 (3/16/13) and Ex Parte Ricky Eugene Jackson, AP-77,008. SR.76-79

the ADA would have predictably declared the affidavit self-serving, and encouraged this Court to disregard it. "[P]leadings are to be treated according to their nature and substance rather than their technical form…." See Commonwealth v. Preston, 393 Mass. 318, 322-24 (1984); see also Commonwealth v. Pring-Wilson, 448 Mass. at 731-32 (okay to cite wrong rule under which motion is brought, it is within a judge's discretion to address the motion in the form before him).

3. Evidence of Dookhan's misconduct was material exculpatory evidence the ADA failed to provide Scott prior to his plea in violation of his right to due process under Brady v. Maryland.

An ADA has a due process obligation to disclose exculpatory, material evidence within his actual or constructive knowledge. See Kyles v. Whitley, 514 U.S. at 437-38(citations omitted). "Exculpatory" evidence tends to negate the accused's guilt. Commonwealth v. Ellison, 376 Mass. 1, 22 n.9 (1978). Here the evidence of Dookhan's misconduct is exculpatory as it tends to negate Scott's guilt. It is material for had Scott known of it there is a reason-able probability he would not have admitted to sufficient facts. State v. Huebler, 275 P.3d 91, 98-99 (Nev. 2012).

Lastly, the ADA's failure to disclose evidence of Dookhan's misconduct is attributable to him because

Dookhan was a member of the prosecution team. See Kyles v. Whitley, 514 U.S. at 437 ("prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case"). Accord Commonwealth v. Woodward, 427 Mass. 659, 679 (1998) (member of ME's Office was a member of the prosecution team and an agent of the Commonwealth for evidence presentation purposes); see also Commonwealth v. Daye, 411 Mass. 719, 734 (1992).

The mission of the Office of the Chief Medical Examiner is to investigate "the cause and manner of death in violent, suspicious or unexplained deaths." SR.75 The mission of the State Lab Drug Unit is to "analyze all contraband seized by State Police, local police agencies, and some federal agencies with the Commonwealth… a drug chemist will generate a report and testify in court if necessary… and on occasion may provide technical assistance to law enforcement personnel in their on-going investigations." SR.75 If a member of the ME's Office is a part of the prosecution team and an agent of the Commonwealth, then it follows a member of the State Drug Lab is likewise so. Accord id.

The ADA cannot wash his hands of his predicament by asserting the information about Dookhan's misdeeds "was contained within the mind of Ms. Dookhan" and

thus unknowable by the DA's Office. C.Br.29 Suffolk ADAs were in direct contact with Dookhan, and they encouraged her to view herself as a treasured member of their team in violation of express policy. They trumpeted her as a heroine, curried favor with her and pandered to her with disturbing frequency. The public as well as the defendant has a right to expect ADAs will conduct themselves professionally and insist others on their team do the same. HRA.19,37,45,162,167

The email correspondence between the Suffolk County ADAs and this chemist, who used her position to forward her own interests and dole out her own brand of justice to others that she, in her individual capacity, branded "bad guys," is so inappropriately familiar, it served to embolden and encourage Dookhan in her misdeeds, and it betrayed the public trust.

It additionally served to undercut the credibility of the MA Attorney General, who during the very same time period Dookhan was unabashedly scheming to trump up charges on those accused, was proclaiming to the U.S. Supreme Court that laboratory analysis here in the Commonwealth is so reliable, and so predictable, that it rises to the level of objective evidence that need not be subject to any challenge by an accused consistent with the Confrontation Clause. See SR.90-112 (11/10/08 oral argument transcript of

Attorney General Martha Coakley in Melendez-Diaz v. MA, 557 U.S. 305 (2009)) and compare Dookhan's email on 6/10/09 to an Assistant United States Attorney revealing her attitude towards defendants was: "get them off the streets." HRA.171a[13]

Also, MA law is clear an ADA's disclosure obligations are not related to an ADA's actual knowledge. See Commonwealth v. Martin, 427 Mass. at 823-24 (ADA had duty to produce evidence unknown to

[13] The email correspondence between the Suffolk ADAs and Dookhan unveil a manner of conducting business decidedly contrary to the impression given the U.S. Supreme Court by the MA Attorney General as to how business was conducted at drug labs in the Commonwealth. HRA.157-59,163,170 Many of the emails produced in discovery and part of the HSL discovery not included in the HRA also demonstrate this point and are contained in the supplemental record appendix of this brief at SR.83-89. Dookhan describes "a lot of work" she does to "bump up" a case "federally" and comments that Suffolk County ADA "Bucci was more than happy to hand over the files" to her, as in her estimation the defendant was "a real winner" who "needed to be locked up and throw away the key." She describes time she herself spent with an alleged victim of the defendant, empathizes with the woman's situation, and gloats that the defendant "will be making a lot of friends in the federal pen, named John. Haha." SR.83 She sees it as part of **her** role to figure how to charge a defendant so that he can be federally prosecuted. SR.84 She discusses trying to persuade "FBI Finn to testify for [**her**]." SR.85 She is a sounding board for prosecutors who wish to lash out against courts, judges, defendants, and attorneys. SR.86-89 She was not an objective analyst. She was a member of the prosecution team. In rejecting the Attorney General's argument the high court ruled, "[n]or is it evident that what respondent calls 'neutral scientific testing' is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation." See Melendez-Diaz v. MA, 557 U.S. at 318.

him but known to a police lab chemist). It is therefore irrelevant whether Dookhan's misdeeds were actually known to the ADA at the time of plea.

This Court should hold Brady v. Maryland, 373 U.S. 83 (1963) required the pre-plea disclosure of this exculpatory information. Here, Dookhan's falsifying drug testing impacted the establishment of Scott's factual guilt. In a non-Brady v. Maryland context, this Court has noted a guilty plea renders irrelevant all pre-plea constitutional violations except those impacting the establishment of a defendant's "factual guilt." See Commonwealth v. Fanelli, 412 Mass. 497, 500-01 (1992). Applying this reasoning in a Brady v. Maryland context, the ADA must disclose material exculpatory evidence even in the context of a guilty plea.

Dookhan's admitted misconduct from 2009-11 outweighs any need for further showing justice may not have been done before a motion for a new trial is granted. The evidence of her misconduct calls into question not only her credibility, but also the reliability of the drug certificate itself, which necessarily implicates the ADA's ability to "prove beyond a reasonable doubt that the substance at issue is a particular drug because such proof is an element

of the crime charged." See Commonwealth v. MacDonald, 459 Mass. 148, 153 (2011)(citation omitted).

Notably, the Supreme Court in U.S. v. Ruiz, 536 U.S. 622 (2002) held the Constitution does not require pre-plea disclosure of impeachment evidence related to informants or other witnesses, but did not hold disclosure of exculpatory evidence is not required. See id. at 625, 629.[14] This Court should find Ruiz is not a bar to a Brady v. Maryland claim in the context of Dookhan's misconduct in light of Fanelli and its application of Article 12 in similar contexts.

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[14] Some courts have interpreted Ruiz to mean the Supreme Court has not foreclosed a challenge to a guilty plea when the prosecution failed to disclose exculpatory evidence before the plea entered. See U.S. v. Fisher, 711 F.3d at 465 n.2 ("Ruiz did not, however, address evidence beyond that for impeachment purposes"); State v. Huebler, 275 P.3d at 96-97 ("We are persuaded by language in Ruiz and due-process considerations that a defendant may challenge the validity of a guilty plea based on the prosecution's failure to disclose material exculpatory information before entry of the plea"); Medel v. State, 184 P.3d 1226, 1234-35 (Utah 2008) (Ruiz allows challenge to prosecution's pre-plea failure to disclose material exculpatory evidence); McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) (because the Ruiz opinion made "a significant distinction between impeachment information and exculpatory evidence", "it is highly likely" Supreme Court would require disclosure of exculpatory evidence pre-plea). Other courts have not adopted this interpretation of Ruiz. See U.S. v. Mathur, 624 F.3d 498, 507 (1st Cir. 2010) (interpreting Ruiz to reject extension of Brady v. Maryland to plea negotiations in context where defendant ultimately went to trial); U.S. v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (rejecting argument Ruiz implied exculpatory evidence is treated differently than impeachment evidence).

The judge made a well-reasoned decision based upon a sufficient record when he granted Scott's plea, and properly exercised his discretion under Rule 30. And while this Court need not reach them in affirming the decision, there are 3 separate alternative grounds upon which to affirm the plea judge's decision. The Commonwealth's appeal should be rejected.

II. ARTICLE 12 DICTATES A RESULT REQUIRING THE COMMONWEALTH TO PRODUCE EVIDENCE OF THE NATURE AT ISSUE HERE, WHICH IS MATERIAL AND EXCULPATORY AS OPPOSED TO MERELY IMPEACHING, WHETHER OR NOT KNOWN TO AN ADA, AS THE EVIDENCE TENDS TO NEGATE THE GUILT OF THE ACCUSED AND THE STATE LAB CHEMISTS ARE PART OF THE PROSECUTION TEAM.

This Court should hold Article 12 required pre-plea disclosure of exculpatory and impeachment information regarding Dookhan. Article 12 provides "every subject shall have a right to produce all proofs, that may be favorable to him." This language is significant, and the right to produce all favorable proofs is meaningless if it does not include a right to be made aware of exculpatory and impeachment information before being induced to plead guilty.

Holding ADAs to a higher standard as to pre-plea disclosure obligations would be consistent with this Court's jurisprudence providing greater protections under Article 12 than those provided by the U.S. Constitution when textual differences support such outcome. See, e.g., Commonwealth v. Mavredakis, 430

Mass. 848, 858-59 (2000)(Article 12 self-incrimination text broader than 5th Amendment); Commonwealth v. Amirault, 424 Mass. at 631 (Article 12 confrontation text broader than 6th Amendment).

This Court balances costs associated with protecting individuals' rights by recalling the values underpinning those rights:

> It may be that application of this standard entails, as it has in the past, the loss of certain pretrial confessions. Our system of justice, however, is not predicated on the fear that suspects will invoke their rights. See Escobedo v. Illinois, 378 U.S. 478, 490 (1964). "While these lost confessions do extract a real price from society, it is one that Miranda itself determined should be borne." [citation omitted]

Commonwealth v. Clarke, 461 Mass. at 336, 350 (2012).

Article 12 expresses we will not permit our government to keep from us "proofs favorable" when it seeks to take away our freedom. Its authors meant to provide us with greater protection than our federal government provides. Accordingly, this Court should honor its longstanding practice of protecting the accused under Article 12 as a matter of state law.[15]

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[15] If this Court steps in and presumes invalid all HSL drug samples Dookhan was able to access, it acts consistently with courts in other states confronted with similar challenges. See, e.g., Matter of Investigation of W. Virginia State Police Crime Lab. Serology Div., 438 S.E.2d 501, 503-04, 506 (W. Va. 1993)(where serologist had long history of "systemic practice" of falsifying evidence, all of his work at any time deemed unreliable); State v. Roche, 59 P.3d 682, 690-91, 695 (Wash. Ct. App. 2002)(new trial

III. THIS COURT SHOULD INVOKE ITS SUPERINTENDENCE POWER TO ALLOW ALL RULE 30 MOTIONS IN ALL CASES IN THIS COMMONWEALTH WHERE DOOKHAN MAY HAVE TAINTED THE DRUG EVIDENCE.

Exceptional circumstances warrant this Court stepping in and implementing a global solution to the Dookhan/Hinton Lab scandal pursuant to its superintendence powers.

> It has long been recognized that the inherent powers of courts are those that are "essential to the performance of their functions, to the maintenance of their authority, and to their capacity to determine the rights of parties according to law." … Significantly, "[a]lthough inherent powers may be recognized by statute, they exist independently, because they 'directly affect[] the capacity of the judicial department to function' and cannot be nullified by the Legislature without violating art. 30 [of the MA Declaration of Rights]."… "The very concept of inherent power 'carries with it the implication that its use is for occasions not provided for by established methods.'"

Commonwealth v. Charles, 466 Mass. at 72-73 (internal citations omitted).

In Charles, this Court considered the issue of whether a special magistrate was properly authorized to grant a stay motion where Dookhan was the primary chemist and concluded:

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granted absent evidence chemist committed misconduct in particular case because his "credibility has been totally devastated by his malfeasance" and "the most important consideration for us now is the preservation of the integrity of the criminal justice system"); State v. Gookins, 637 A.2d 1255, 1259-60 (N.J. 1994)(setting aside drunk driving pleas where arresting officer committed "widespread misconduct" by falsifying breath testing in unrelated cases).

> It is contrary to the interests of justice that Charles remain incarcerated while the nature and scope of the alleged misconduct at the Hinton drug lab are investigated and fully ascertained….The allegations of misconduct at the Hinton drug lab have given rise to serious concerns about defendants who may be incarcerated as a consequence of tainted convictions." Id. at 77.

This Court has thus far been a proponent of deciding motions connected to this scandal "in an expeditious manner." Id. Such expeditious administration of justice is what the superintendence power of this Court was created to address.

> General Laws c. 211, §3, provides… "[t]he supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided…." This court's superintendance powers are discretionary and will be exercised only in "the most exceptional circumstances."… Generally speaking, a party seeking review under G. L. c. 211, §3, must demonstrate both a violation of the party's substantive rights and the unavailability of adequate relief through the ordinary appellate process … However, we have said that where "a systemic issue affecting the proper administration of the judiciary has been presented, resolution of the issue by this court is appropriate." … In the past, we have exercised our general superintendence powers to resolve, among other things, "important issues with implications for the effective administration of justice" and "matter[s] of public interest that may cause further uncertainty within the courts."

Id. at 88-89 (internal citations omitted). There is no other remedy or adequate relief available through the

ordinary appellate process to address Dookhan's irreparably tainting drug evidence in 63,966 samples entrusted to her from 2004-11, other than this Court stepping in and exercising its inherent authority to resolve these matters. HRA.83,108-12,113,119

The questions before this Court in Charles, while different from those in this case and its companion cases, arise from and touch upon the same rights affected by the same affront to justice unsurpassed in scope and severity to anything this Commonwealth has confronted in recent history. In sum, "present exceptional circumstances warrant this Court's exercise of its general superintendence powers under G.L. c. 211, §3." Id. at 89. In order to avoid uncertainly in the courts, and to effect the proper administration of justice, this Court should exercise its inherent authority to administer justice by invocation of its power of superintendence and order all inferior courts of this Commonwealth to allow Rule 30 motions brought by defendants impacted by the Dookhan/Hinton Lab scandal.

IV. THIS PARTICULAR CASE IS ABOUT UPHOLDING THE DECISION OF ONE JUDGE WHO EXERCISED HIS SOUND DISCRETION TO GRANT RELIEF TO ONE MAN BASED UPON A SPECIFIC SET OF FACTS AND A SUFFICIENT RECORD IN SUPPORT OF THAT SINGLE REASONED DECISION.

Irrespective of how this Court views the "global solution" arguments forwarded herein under Issues II

and III *supra*, the significance of the appeal taken by the Commonwealth in this case most acutely affects the life one man who is entitled to have the focus remain on the facts and circumstances specific to his case. Even if this Court rejects the suggestion of any sort of "global solution" to the Dookhan/Hinton Lab debacle as a whole, Rakim Scott must prevail on these specific facts and this specific record.

Here the plea judge, tasked with the obligation to see that justice was done in this case, properly exercised his discretion to grant Scott's motion. "It is the plea judge who had the advantage of firsthand evaluation of the… evidence." Commonwealth v. Preston, 393 Mass. at 324 (citation omitted). "He may be aware of nuances of conduct, tone, and evidence that easily escape the cold record available to an appellate court on review." Id. citing Commonwealth v. Ellison, 376 Mass. at 16-17. "Furthermore, it is irrelevant what the Justices of this court would have done had they been in the position of the trial judge. [Your] task is only to ensure that there exists in the record before [you] evidence to support the judge's decision to order a new trial." Id. (citation omitted)

The judge properly exercised his authority and did justice on behalf of a 22-year-old man. R.1 He clearly reviewed the record of this particular case,

including the pleadings, criminal complaint, affidavit of counsel and specific allegations against Dookhan. T2.1-10 He did what the law requires, and his decision should not be disturbed.

This is a clean, simple fact pattern. The police removed a white substance from Rakim Scott, sent it to the HSL for analysis, and charged him with possession of a controlled substance. R.17 There are no other charges, and no other evidence, circumstantial or otherwise, against Scott.[16] There is no evidence to prove he possessed any controlled substance other than the drug certificate signed by primary chemist Dookhan.[17] The judge was aware Dookhan was under indictment for tampering with drug evidence in numerous cases. T2.4 The ADA conceded if Scott knew of these facts before entering the plea, it would likely have affected the case's outcome. T2.6-7

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[16] Contrast companion cases with additional charges and circumstantial evidence: Commonwealth v. Adam Davila, SJC-11463 (police made surveillance observations of Davila in a hand-to-hand exchange with a separately charged individual who stated she purchased drugs from Davila and the police recovered suspected drugs from that individual, police also recovered a cell phone used to facilitate this transaction from Davila pursuant to arrest along with $211.00 U.S. currency); Commonwealth v. Corey Bjork, SJC-11464 (police observed Bjork conduct a hand-to-hand with a separately charged individual, Bjork admitted to purchasing drugs from that individual for $200 U.S. currency, the separately charged individual also made statements implicating Bjork in a drug transaction).

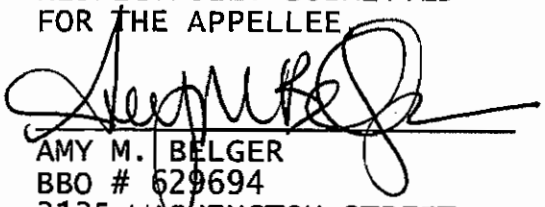
[17] Contrast companion cases where Dookhan was the confirmatory chemist: Commonwealth v. Adam Davila, SJC-11463; Commonwealth v. Rene Torres, SJC-11466.

That is sufficient evidence to support the judge's exercise of his discretion to grant Scott's motion. Nothing else is required. The law is clear, leaving all the fanfare associated with this gigantic drug lab scandal aside, Scott is entitled to the benefit of the plea judge's reasoned exercise of discretion in his favor on familiar and well-settled grounds of Rule 30 jurisprudence. See, e.g., Commonwealth v Clemente, 452 Mass. at 304, Commonwealth v. Conaghan, 433 Mass at 106, Commonwealth v. Amireault, 424 Mass. at 637 and Commonwealth v. McCarthy, 375 Mass. at 414-15 & n.5

CONCLUSION

For all of the foregoing reasons, Scott requests this Court affirm the judge's decision to allow him to vacate his plea in this matter and proceed to trial.

RESPECTFULLY SUBMITTED
FOR THE APPELLEE,



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