COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
SJC-11709.

HAMPDEN COUNTY.

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

BRYANT WARE,
Appellant.

Reply Brief of Appellant, Bryant Ware.

Respectfully submitted
for Bryant Ware,

James P. McKenna, Esquire
BBO # 548681
James P. McKenna
Attorney at Law
P.O. Box 541
North Grafton, MA 01536
774.317.0983
James.P.McKenna.Esquire@aol.com

August 13, 2014

Table of Contents

Table of Authorities

Cases

Argument in Reply[1]

I. Since the instant appeal concerns the denial of a motion for post-conviction discovery, not a motion for a new trial, the Commonwealth's argument and the conclusion suggested by that argument are immaterial to the question before the court.

The question properly before this court concerns whether the sought discovery "is reasonably likely to uncover evidence that might warrant granting a new trial," with the prospective motion for a new trial being grounded on *Ferrara v. United States*, 456 F. 3d 278 (1st Cir. 2006). *Commonwealth v. Morgan*, 453 Mass. 54, 61-62 (2009). The Commonwealth, however, has applied the standard of analysis applicable to consideration of whether a decision on a motion for a new trial was proper. Comm. Br. 11-24. In doing so, the Commonwealth has applied an inapplicable standard of analysis.

In essence, rather than discuss whether the sought discovery would be reasonably likely to uncover evidence that might warrant granting a new trial, the Commonwealth applies an analysis based on *Ferrara* to

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[1] The Record Appendix will be cited as "R.A. [page]," the Substitute Brief for the Commonwealth will be cited as "Comm. Br. [page number]," and Mr. Ware's appellate brief will be cited as "Ware Br. [page number]."

the existing record, and concludes such record does not now support the allowance of a motion for a new trial. Comm. Br. 11-24. *See, e.g.*, Comm. Br. 14 and 20-21 ("In the Commonwealth's view, the defendant's submission did not satisfy either prong of the *Ferrara* analysis. . . . As to the second prong of the *Ferrara* analysis, the defendant failed to establish a reasonable probability that he would not have pled guilty had he known of Ms. Farak's misconduct").

The critical distinction missed by the Commonwealth is that whether the sought discovery is reasonably likely to apply to a *Ferrara* analysis pursuant to which a new trial might be allowed is an entirely different question than whether the application of the *Ferrara* analysis to the current record supports the allowance of a new trial.

As a consequence of the Commonwealth's argument being directed to the wrong standard, such argument and the conclusions drawn from by that argument should be disregarded. (Nevertheless, Mr. Ware will comment, *below*, on some of the points raised in the Commonwealth's brief).

The Commonwealth recognizes that, with respect to the malfeasance of Annie Dookhan, "[t]he nature of Ms. Dookhan's misconduct was such that it was not possible, after the fact, to resolve the question [of] whether she engaged in misconduct in a particular case." Comm. Br. 19 (*citing Commonwealth v. Scott*, 467 Mass. 336, 351-52 (2014)). The discovery sought by Mr. Ware is directed toward establishing that the nature of Ms. Farak's misconduct was such that it is not now possible to resolve the question of whether she engaged in misconduct in any particular case, including each of Mr. Ware's cases. *See, e.g.*, Ware Br. 21 ("[s]pecifically, Mr. Ware's argument tracks the Supreme Judicial Court's reasoning that the impairment of the integrity of the Commonwealth's evidence by another felonious chemist, Annie Dookhan, properly should be deemed to have created conclusive presumptions of malfeasance relative to individual cases. *Scott*, 467 Mass. at 362.").

In that context, the Commonwealth's claim that the sought discovery lacks "any nexus" to Mr. Ware's own cases wholly misses the mark. Comm. Br. 20. Rather, should the sought discovery establish that a conclusive presumption of malfeasance is applicable

here, such development well might form the basis for granting a motion for a new trial as to each of Mr. Ware's cases.

As with the evidence attributed to Mr. Ware's individual cases, it would, of course, be possible to test samples relative to which Ms. Dookhan reported results, though such an exercise would not produce results which should be accorded any credibility. That lack of credibility would be a consequence of the fact that the extent of Ms. Dookhan's malfeasance is, essentially, not unknown.

That the extent of Ms. Farak's malfeasance is not yet known is proximately attributable to the Commonwealth's ongoing and ignoble failure to determine the degree to which the integrity of the evidence throughout its Amherst drug lab has been compromised.[2] In that circumstance and given the likelihood that Ms. Farak's malfeasance substantially

[2] On appeal, the Commonwealth remains on the wrong side of this matter. Were it driven less by the interest in preserving convictions and more by advancing the interests of justice, it would itself seek to determine the extent to which Ms. Farak's malfeasance has compromised its evidence, or perhaps join with Mr. Ware in seeking to do so.

pre-dated July 2012,[3] re-testing of the particular samples attributed to Mr. Ware's cases would not be an exercise that would promise credible results, and Mr. Ware has not sought to do so.

The purpose of Mr. Ware's post-conviction discovery motion - the point of the instant litigation, is to reach the truth that the Commonwealth choice to fail to investigate has kept largely undiscovered. The most foreseeable result of that failure was precisely the circumstance in which the Commonwealth now seeks refuge - the argument that, unlike the situation with Ms. Dookhan, there is not presently conclusive evidence that Ms. Farak engaged in pervasive misconduct. Comm. Br. 16-18.

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[3] In his brief, Mr. Ware points out that random re-testing resulted in the identification of three instances from July, 2012, in which Ms. Farak had stolen evidence from samples and replaced it with soap. Ware Br. 15. From that, he argues that it would be most improbable that, without comprehensive re-testing, the Commonwealth happened upon the first three occasions upon which Ms. Farak engaged in that practice - and so common sense would suggest that it was likely that she did not begin that practice in July, 2012. Ware Br. 15. The Commonwealth's brief contains no mention of that argument.

In that regard, the Commonwealth seeks to distinguish the drug-lab malfeasance of Ms. Dookhan from the drug-lab malfeasance of Ms. Farak by reference to the fact that some re-testing has been undertaken in Ms. Farak's cases. Comm. Br. 19-20. That some random re-testing has occurred, however, in no way indicates that Ms. Farak has not compromised the integrity of the Commonwealth's evidence.

Rather, such random re-testing has produced evidence to the opposite effect - it has led to the identification of a series of matters in which Ms. Farak tampered with evidence with which she had been entrusted (matters in which no charges were brought). *See, e.g.*, R.A. 87-89.

Based on the information presented to this court in *Scott*, the court concluded: "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, starting as early as 2004, during her first year of employment." *Scott*, 467 Mass. at 340. Such circumstance was attributable to Ms. Dookhan reporting results without actually having conducted the corresponding tests. *Scott*, 467 Mass. at 339-40.

When Ms. Farak and Ms. Dookhan worked together at the Hinton laboratory in 2004, however, Ms. Farak reported substantially more results that did Ms. Dookhan. R.A. 265, 274. Specifically, in the seven months they worked together, Ms. Dookhan reported 4,427 results, and Ms. Farak reported 5,847 results. R.A. 265, 274. At no point in its appellate brief does the Commonwealth countenance that fact. *Compare* Ware Br. at 5, 17-18.

With respect to the likelihood that Ms. Farak's malfeasance was ongoing before July, 2012, and in light of the Commonwealth's inglorious failure to identify the extent to which its evidence has been compromised, it is most unfortunate that the Commonwealth has taken the unbecoming position that Bryant Ware's effort to obtain discovery should fail because he cannot now establish the full extent of such poorly-supervised chemist's misconduct.

Should the sought discovery be obtained and indicate that a conclusive presumption of malfeasance would be appropriate, then the Commonwealth's narcotics evidence in each of Mr. Ware's cases would be subject to suppression. See, generally, *Scott*, 467 Mass. at 347-54.

In turn, the inadmissibility of the Commonwealth's evidence, in conjunction with the Commonwealth's resulting inability to prove its case, could not but be deemed material to the decision as to whether to tender a plea of guilty. *See* R.A. 298-99 (Special Judicial Magistrate John C. Cratsley's holding that "[w]here that information may well have cast significant doubt on the Commonwealth's ability to meet its burden of proving the composition and weight of the substance, it can hardly be said that the value of such information was outweighed by the reduced sentence that the defendant received in exchange for his guilty plea").

In that regard, it is manifestly certain that the Commonwealth's inability to prove charges against a defendant would tend to a reasonable degree to influence such defendant's decision as to whether to plead guilty to such charges - regardless of what other charges were pending against such defendant. *See, generally, Commonwealth v. Cohen (No. 1)*, 456 Mass. 94, 125 (2010) (in the context of perjury, "a statement is 'material' if it tends 'in reasonable degree to affect some aspect or result of the inquiry") (*quoting Commonwealth v. D'Amour*, 428 Mass.

725, 744 (1999), *quoting Commonwealth v. McDuffie*, 379 Mass. 353, 360 (1979)).

As to the foregoing, the Commonwealth details the other charges against Mr. Ware, then misapplies the inapplicable *Ferrara* analysis - by failing to consider whether the prospective inability of the Commonwealth to prove its narcotics cases against Mr. Ware *might have tended* to influence his decision to tender guilty pleas in such regards. Comm. Br. 20-24).

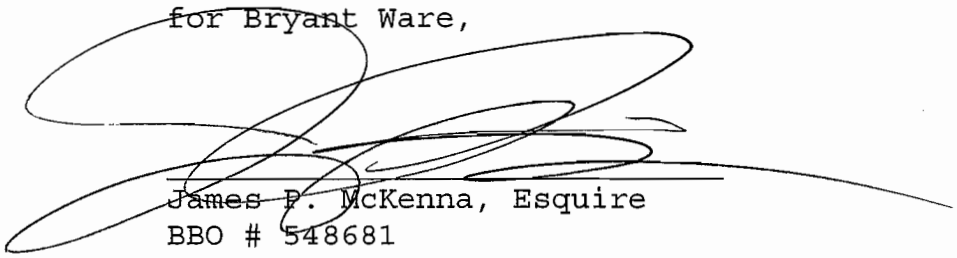
Specifically - and notwithstanding the Commonwealth's analysis, whether the Commonwealth's prospective inability to prove its narcotics charges against Mr. Ware should be deemed material to his decision to tender guilty pleas should not - as the Commonwealth suggests (Comm. Br. 20-24) - be determined by consideration of the question of whether he would have tendered those pleas anyway, but rather should be determined by whether such inability would tend to influence the decision to do so. *See, Cohen (No. 1)*, 456 Mass. at 125.

Thus, at best, the Commonwealth argument is comprised of a misapplication of the inapplicable *Ferrara* analysis, and should be accorded no weight.

Conclusion

In light of the foregoing, the denial of Mr. Ware's motion should be reversed, and the matter remanded to the Superior Court for the issuance of an order that will provide for the sought discovery.

Respectfully submitted
for Bryant Ware,



James P. McKenna, Esquire
BBO # 548681
James P. McKenna
Attorney at Law
P.O. Box 541
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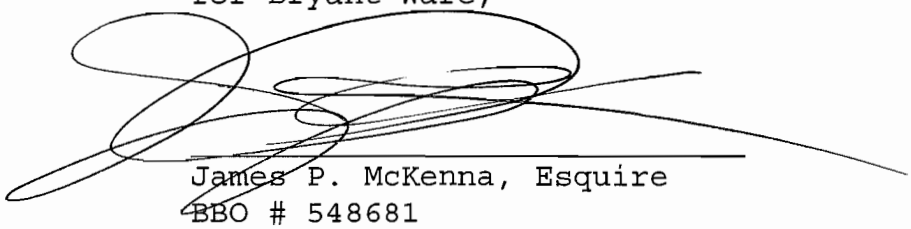
COMMONWEALTH	)	
	)	
v.	)	CERTIFICATION.
	)	
BRYANT WARE	)	

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

Respectfully certified,
for Bryant Ware,



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