COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

_____

No. SJC-12430

_____

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

JUSTINO ESCOBAR,
Defendant-Appellant.

_____

COMMONWEALTH'S BRIEF

_____

SUFFOLK COUNTY

_____

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II. WHETHER THE MOTION JUDGE ABUSED HER DISCRETION IN DENYING THE DEFENDANT'S CLAIM WHICH ALLEGED NOTHING MORE THAN SPECULATIVE MISCONDUCT GROUNDED UPON THE PILING OF INFERENCE UPON INFERENCE.

III. WHETHER THE DEFENDANT'S CLAIM IS RIPE WHERE HE WAS NOT SUBJECT TO A FINAL ORDER BELOW AND THE MOTION JUDGE, IN THE ISSUANCE OF HER DISCOVERY ORDER, INTENDED TO REVISIT THE DEFENDANT'S CLAIM AFTER DISCOVERY COMPLIANCE.

STATEMENT OF THE CASE

I. THE DEFENDANT'S INDICTMENT AND CHANGE OF PLEA

On January 27, 2009, a Suffolk County grand jury returned an indictment against the defendant charging him with trafficking in cocaine over 200 grams, in violation of G.L. c. 94C, § 32E(b)(4) (R.A.[1] 4, 14). On December 3, 2009, the defendant came before the Honorable Stephen Neel and changed his plea to guilty

[1] Citations to the Record Appendix will be cited by page number as (R.A. __); citations to the Commonwealth's Supplemental Appendix will be cited by page number as (C.A. __); citations to the defendant's brief will be cited by page number as (D.Br. __).

to so much of the indictment as alleged trafficking in cocaine over fourteen grams (R.A. 6). The defendant was sentenced to eight to twelve years in state prison (R.A. 6).

II. THE DEFENDANT'S POST-CONVICTION MOTIONS & THE TRIAL COURT'S ORDERS

Seemingly at issue in the instant appeal are four post-conviction motions: "Defendant's Motion for a New Trial" (R.A. 16-18; C.A. 1-181), "Mr. Escobar's Motion to Vacate and for the Sanction of Dismissal" (R.A. 167-9), "Mr. Escobar's Motion for a *Cotto* order" (R.A. 264), and "The Defendant's Motion for Leave to Conduct Post-Conviction Discovery" (R.A. 19-20; C.A. 182-96). The motions were filed and supplemented several times and came before the Honorable Christine Roach for a hearing on August 17, 2017 (R.A. 12).

A. Defendant's Motion for a New Trial

In his motion for a new trial, the defendant sought vacatur of his conviction pursuant to *Commonwealth v. Scott*, 467 Mass. 336 (2014) and *Commonwealth v. Ware*, 471 Mass. 85 (2015) alleging the Commonwealth failed to properly investigate misconduct at the Hinton Laboratory (R.A. 16-7). Following the

August 17, 2017 hearing, Judge Roach ruled that she would not consider the defendant's motion for new trial until after discovery compliance (R.A. 12, 411).

B. Mr. Escobar's Motion for a "*Cotto*" Order.

In his "Motion for a *Cotto* order", the defendant asked the court to "require the Commonwealth to disclose within thirty days whether it will conduct an investigation as to whether any chemist at the Hinton laboratory -- besides Ms. [Annie] Dookhan and Ms. [Sonja] Farak -- engaged in malfeasance which impaired the integrity of the Commonwealth's evidence" (R.A. 264). On August 17, 2017, in a margin note, Judge Roach ruled:

> Following hearing, motion Denied, the *Cotto* case 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 trial 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

(R.A 402).

C. Mr. Escobar's Motion to Vacate and for the Sanction of Dismissal.

In his "Motion to Vacate and for the Sanction of Dismissal" the defendant argued that the Massachusetts Inspector General, through the alleged inadequacy of his investigation, had engaged in egregious prosecutorial misconduct, and that "the failure to conduct [an adequate] investigation was a violation of the constitutional right of [the defendant] to Due Process as guaranteed by both the Fourteenth Amendment to the Constitution of the United States and Article XII of the Massachusetts Declaration of Rights" (R.A. 168). On August 17, 2017, in a margin note, Judge Roach ruled:

> Following hearing, motion Denied. Nothing on the record before me demonstrates or even suggests that the Inspector General engaged in misconduct of any sort. I find no support in fact or law for dismissal on this basis at this time.

(R.A. 401).

D. Defendant's Motion for Post-Conviction Discovery.

In his motion for post-conviction discovery, the defendant asked "this Honorable Court kindly provide that a reasonable number -- perhaps 200 -- of the

samples purportedly tested at the time be compared with the results attributed by Ms. Saunders to those samples" (C.A. 196). The Commonwealth takes his request to require re-testing of samples. On August 25, 2017, Judge Roach denied the defendant's request to re-test 200 samples, but ordered the production of several items:

1. 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;

2. Any notes, transcripts or other documentation of interviews of Saunders conducted during the period 2002 to present, by an person or entity engaged in an investigation of the Hinton or Amherst labs;

3. A list of court cases in which Saunders testified as certifying chemist in the Commonwealth during the years 2005-2008;

4. Available data on the numbers and types of drug test performed by Saunders at the Hinton lab for any purpose for the years 2005-2008.

(R.A. 411). Judge Roach then ordered the parties to appear before her for a status conference in approximately ninety days (R.A. 411). Nowhere in the defendant's brief does he address the denial of his motion for discovery, the Commonwealth accordingly

presumes he has abandoned his appeal relative to that issue.

E. The Defendant's Notice of Appeal.

Notwithstanding Judges Roach's order that "the defendant's motion for new trial will not be taken under advisement until this discovery is completed" (R.A. 411), the defendant filed notices of appeal on August 21, 2017 and September 22, 2017 (R.A. 403, 412).

STATEMENT OF FACTS

I. THE CRIME

On November 8, 2008, Boston Police Officers observed the defendant operating a Honda Accord traveling on Harvard Street (C.A. 203, 205). A Registry of Motor Vehicles query of the vehicle revealed that its registration was suspended (C.A. 203). The officers stopped the defendant's vehicle, informed him that the registration was suspended and, as a result, the vehicle must be towed (C.A. 203-4).

During the course of the inventory search that followed, the officers noticed an open "hide compartment" located under the front passenger seat

(C.A. 207). Inside the hide, the officers found several balls of white powder wrapped in tin foil (C.A. 208). One of the balls was partially open, revealing cocaine (C.A. 208). The defendant was placed into custody at that time (C.A. 209).

The officers also recovered a cigarette box on the defendant's person containing additional cocaine, which the defendant indicated was for his "personal use" (C.A. 210). The defendant, who claimed to be unemployed, was also in possession of $920 (C.A. 213-4). The officers found the defendant's birth certificate and social security card inside the vehicle (C.A. 210).

The narcotics were submitted for analysis to the Hinton Laboratory on November 12, 2008 (C.A. 180, 211). Della Saunders performed the primary custodial analysis, Kate Corbett performed the secondary confirmatory gas chromatograph mass-spectroscopy ("GC/MS") analysis (C.A. 180). On December 15, 2008, they concluded that the evidence was 252.18 grams of cocaine (C.A. 180). Neither Annie Dookhan nor Sonja Farak took part in the analysis of the defendant's narcotics (C.A. 180), and the narcotics were analyzed

over four years after Farak's transfer to the Amherst lab (R.A. 184; C.A. 180, 957).

II. THE RETEST

Following the docketing of the instant appeal, the evidence in the defendant's case was submitted to the Massachusetts State Police laboratory (C.A. 1644). The Massachusetts State Police laboratory determined the evidence to be cocaine (C.A. 1644-5).

III. THE DEPARTMENT OF PUBLIC HEALTH LAB INVESTIGATIONS

A. The Attorney General's Investigation of Annie Dookhan

In the summer of 2012, following the State Police take-over of the Hinton Laboratory, Detective Captain Joseph Mason, and Detective Lieutenant Robert Irwin of the Massachusetts State Police began to investigate testing practices at the Hinton Laboratory (C.A. 346). During that initial investigation, the troopers interviewed Daniel Reczkowski (C.A. 237-41), Mai Tran (C.A. 242), Della Saunders (C.A. 243-4), Charles Salemi (C.A. 245-9), Michael Lawler (C.A. 250-2), Peter Piro (C.A. 253-6), Shirley Sprague (C.A. 257-8), Elizabeth O'Brien (C.A. 259-62), Hevish Lleshi (C.A. 263-5), Lisa Glazer (C.A. 266-7), Gloria

Phillips (C.A. 268-70), Nicole Medina (C.A. 271-2), Kate Corbett (C.A. 277-8), Daniella Frasca (C.A. 273-4), Kevin McCarthy (C.A. 275-6), Sandra Lipchus (C.A. 279-80), Stacy Desjardins (C.A. 281-2), Chuck Ifezue (C.A. 286), John Donovan (C.A. 285), Sosah Haynes (C.A. 283-4), James Hanchett (C.A. 287-8), Farak (C.A. 289-90), Rebecca Pontes (C.A. 291-2), Sharon Salem (C.A. 295-6), Gerald Giguere (C.A. 293-4), Paul Jaszek (C.A. 297-8), Donna Lacroix (C.A. 299-300), Allan Stevenson (C.A. 301-2), Dookhan (C.A. 303-13), Xiu Ying Gao (C.A. 314-5), Zhi Y. Tan (C.A. 316-7), Sidney Fuller-Jones (C.A. 318-9), Stephen Ridley (C.A. 320-1), Janice Zanolli (C.A. 322-3), and Paul Servizio (C.A. 324-5). As part of that investigation, the State Police and digital evidence analysts seized computers assigned to lab personnel, including Saunders (C.A. 330). In the grand jury investigation that followed, the grand jury took eight days of testimony from Marco Depalma (C.A. 337-8), Det. Lt. Irwin (C.A. 344-75, 382-90, 475-92), Renczkowski (C.A. 396-432), Corbett (C.A. 438-68), Nancy Brooks (C.A. 498-523), and Carly Rose (C.A. 523-33).

On August 28, 2012, Det. Capt. Mason and Det. Lt. Irwin interviewed Dookhan at her home (C.A. 303-6). During the course of that interview, Dookhan made several admissions, which were memorialized in a report as follows:

> Dookhan then explained that she would routinely secure a large number of samples from evidence. She would then group them on her bench by the same suspected drug. Dookhan would lay out a number of samples from various cases. She would separate suspected cocaine in one area, suspected heroin in another area, and so on. She would also set aside unknowns. Dookhan would identify the drug by the type of suspected drug that was checked off on the control card. She then went on to explain that she would lay out about twenty-five samples of what she felt were the same type of drug [so called "dry-labbing"]. Dookhan would then actually test approximately five samples properly at her bench. She would then prepare all her cocaines, heroins, and other vials for mass/spec, for all of the drug samples. The samples that she did not properly test she would label as the drug she suspected it of being.
>
> 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.
>
> Prior to Dookhan being removed from the testing lab in June of 2011, she "dry labbed" for two to three years. She has no knowledge of anyone else in the lab using improper testing methods. She advises that she was not tipped by anyone in the lab in regards to the June 2011 samples being improperly obtained, not entered, and the forgery of the log book. Dookhan also advised that no one at the lab knew of her "dry labbing" or her intentional contamination of samples. She never confided in anyone about what she was doing. She also stated that she has no knowledge of anyone else in the lab not performing proper analysis.

(C.A. 305-6). The investigation also revealed that Dookhan forged the initials of other chemists (C.A. 237, 240, 277, 403-6, 440), failed to adequately tare her balance (C.A. 255), and falsely claimed to have possessed a Masters of Science in chemistry from the University of Massachusetts at Boston (C.A. 373-4).

B. The Inspector General's Investigation

In November 2012, following the closing of the Hinton Laboratory, Governor Deval Patrick asked the Office of the Inspector General ("OIG") "to conduct an independent, top-to-bottom review of the Drug Lab" (R.A. 29). That mandate called for a comprehensive review of the operation and management of the lab from 2002–2012 "to determine whether any chemists, supervisors or managers at the Drug Lab committed any misfeasance or malfeasance that may have impacted the reliability of drug testing" (R.A. 29).

To accomplish this goal, the OIG, over the subsequent fifteen months "reviewed more than 200,000 documents including, but not limited to, lab records, retesting data and results, emails and internal memoranda" (R.A. 29). The OIG supplemented this review of technical data with interviews of "more than forty individuals associated with the lab, most of them under oath" (R.A. 29). The OIG also "conducted a comprehensive review of over 15,000 drug samples originally tested between 2002 and 2012" (R.A. 237).

The OIG concluded, *inter alia*:

> 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. The OIG found no evidence that Dookhan tampered with any drug samples assigned to another chemist even when she played a role in confirming another chemist's test results

(R.A. 29). Following the issuance of its report, the OIG continued its investigation by embarking on a review of multi-run samples, i.e. the samples most susceptible to misconduct or testing inaccuracies (R.A. 239), "includ[ing] the laboratory work of all the chemists who worked in the drug lab from 2002-2012, as well as all classes of controlled substances that the drug lab had tested" (R.A. 240).

The OIG analyzed the GC/MS data of 10,821 multi-run samples by reviewing: "(1) the control cards; (2) the control sheets; (3) the powder sheets; (4) both handwritten and typed batch sheets; and (5) any other documents associated with each sample, including the drug receipt and, if available, the certificate of analysis" (R.A. 240-1). This data was reviewed by Jack Mario, a leader in the forensic

community with thirty years' experience in forensic chemistry, (R.A. 241), and Michael Wolf, a former Assistant Director of the FBI, with extensive history reviewing troubled laboratories (R.A. 241).

This review also included extensive re-testing (R.A. 241, 245-6). The OIG analyzed 1,203 samples utilizing ramen spectroscopy (R.A. 241) and 609 samples were sent for independent GC/MS analysis to NMS Labs in Pennsylvania (R.A. 245-6). NMS is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board ("ASCLD/LAB") for the testing of controlled substances (R.A. 245).

Following the analyses of the multi-run samples, the OIG concluded that there were no "widespread testing inaccuracies" (R.A. 261).

C. The Initial Farak Investigation

The Attorney General conducted an initial investigation relative to the misconduct of Farak in January 2013 (C.A. 546-54). That investigation, and the indictment that followed, focused on the immediate actions which led to Farak's arrest, namely her theft of controlled substances from the Amherst Laboratory in January 2013 (C.A. 551-2).

D. The Caldwell Report

In September 2015, following the order from this Court in *Commonwealth v. Cotto*, 471 Mass. 97 (2015), the Attorney General opened a grand jury investigation to "determine the timing and scope of Farak's misconduct" beyond her actions in January 2013 (R.A. 181). That investigation was conducted by two assistant attorneys general who did not participate in the initial investigation into Farak, and a retired judge of the Superior Court department (C.A. 928). To that end, the grand jury received testimony from Farak (C.A. 929-1129, 1133-1279, 1284-1353), Hatchet (C.A. 1358-1469), Salem (C.A. 1474-1534), Pontes (C.A. 1534-87), and Brooks (C.A. 1592-1642). The Caldwell investigative team also interviewed Dookhan (R.A. 228-31).

As it pertains to the instant case, the Caldwell investigation established that in May 2003, Farak began work at the Hinton Laboratory's drug lab (R.A. 183-4; C.A. 937-8). She remained there for approximately one year before transferring to the Amherst laboratory in August 2004 (R.A. 184; C.A. 957). Prior to her employment at the Department

of Public Health, Farak was a recreational user of marijuana and, during graduate school, had once tried cocaine and heroin (R.A. 185; C.A. 980-1). It was only after she started in Amherst, sometime in late 2004 or early 2005, that she tried the methamphetamine standard stored at the Amherst laboratory (R.A. 185; C.A. 982-3, 1117, 1142-3, 1307, 1339). She never tried the standards at the Hinton Laboratory (C.A. 983, 986, 1117, 1339), nor had access to them (C.A. 983). Farak did not begin taking from police submitted samples until 2009 (C.A. 1015, 1139).

During the six months Dookhan and Farak worked together at the Hinton Laboratory, they had a cordial and professional relationship (R.A. 229; C.A. 955). Farak never discussed recreational drug use with Dookhan (R.A. 229-30), nor did Farak ever appear under the influence of narcotics (R.A. 230). Dookhan told investigators that she never had access to the standards at the Hinton Laboratory, and Salemi or Piro were responsible for ordering standards (R.A. 230).

Farak further outlined her siphoning of drugs while at the Amherst laboratory: from the lab's standards (R.A. 186; C.A. 982-3, 990-3, 1002-3),

police-submitted samples (R.A. 189; C.A. 1009-10), and other chemists' samples (R.A. 193; C.A. 1080). Farak also testified about her manufacture of crack cocaine at the Amherst laboratory (R.A. 194; C.A. 1071).

IV. THE TESTING VOLUMES

Over the course of the relevant time period, i.e. 2004-2012, twenty-nine chemists worked at the Hinton Laboratory (R.A. 152-62). Of the 292,419 samples tested over that time period, nineteen of those chemists were responsible for 283,007 samples, comprising ninety-seven percent of the total analyses (R.A. 152-62).[2] Of particular significance for the purposes of the defendant's claims, are the testing volumes of Saunders as compared to those of Dookhan. In the years they worked together, Saunders tested a total of 37,945 samples against Dookhan's total of 63,876 (R.A. 157-61). Put another way, Dookhan tested

[2] The chemists accounting for ninety-seven percent of the samples in that time period bore the initials (as described in the pivot table): ASD [Dookhan], CBS, DCS [Saunders], DJR, DXF, ELO, JH, JH- [Jim Hanchett's name appears as two columns, which the Commonwealth has merged for the purposes of clarity of presentation], KAC, KMC, LAG, MAI, MGL, NEM, PJP, RP, RP-1 [as with Hanchett, this data has been merged], SJF, SLD, XYG, ZYT (R.A. 152-62).

over sixty-five percent more samples than Saunders during that time period, notwithstanding the fact that the time period includes the six months after which Dookhan's testing duties had been revoked (R.A 161), and three months from 2006–2007 when she was not testing samples (R.A. 159-60); *see Chart I*.

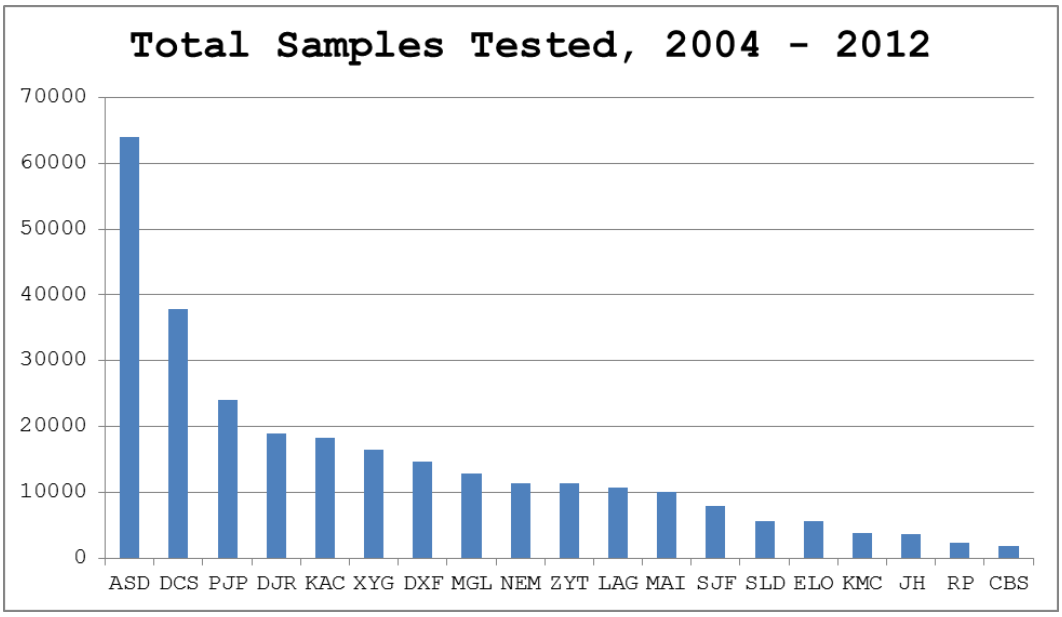

Chart I. Total Samples by Chemist from 2004–2012. Data derived from Pivot Tables is sorted in descending order (R.A. 152-62).

Likewise, when viewed from a monthly perspective, Dookhan's productivity dwarfed that of all other chemists, whether viewed from the perspective of median or mean volumes. Dookhan's sample volume, controlling for months not worked, had a mean value of 680 and median value of 667 as against Saunders'

median volume of 395 and mean volume of 399 (R.A. 152-62); *see Chart II*.

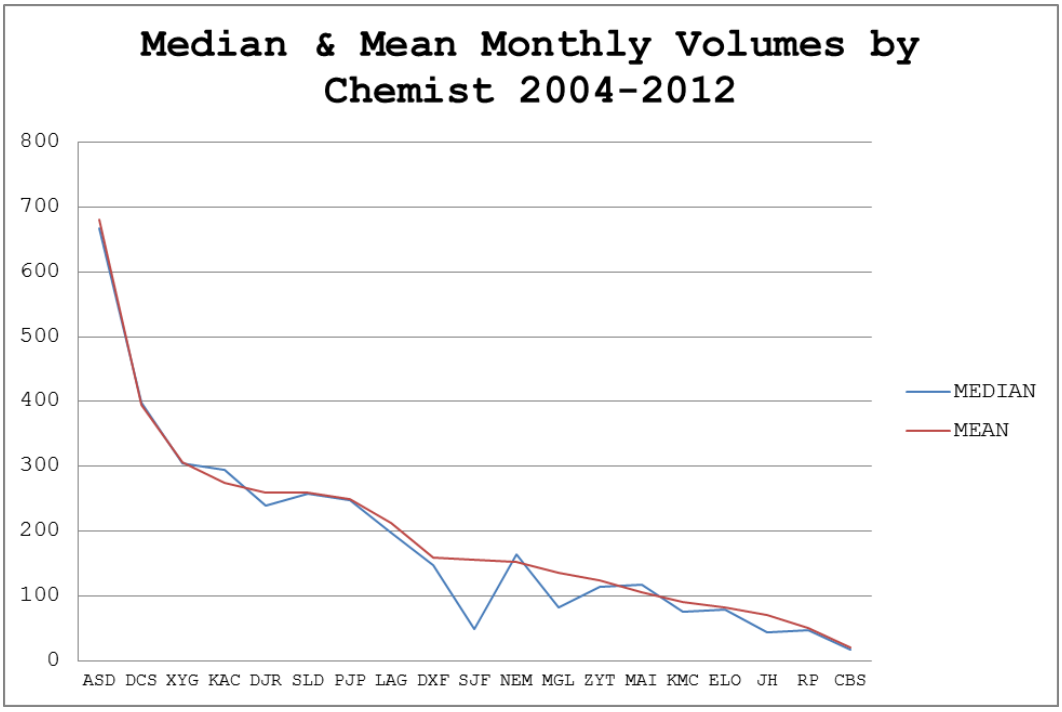

Chart II. Total Median and Mean Monthly Volumes by Chemist from 2004-2012. Data derived from Pivot Tables is sorted in descending order (R.A. 152-62).

In 2007, Saunders' testing volume approached that of Dookhan, however, as Chart III illustrates, it is more accurate to say that in 2007, Dookhan's testing volume dipped to that of Saunders (R.A. 159), this, notwithstanding the fact that in January 2007, Dookhan tested a mere two samples (R.A. 159); *see Chart III*.

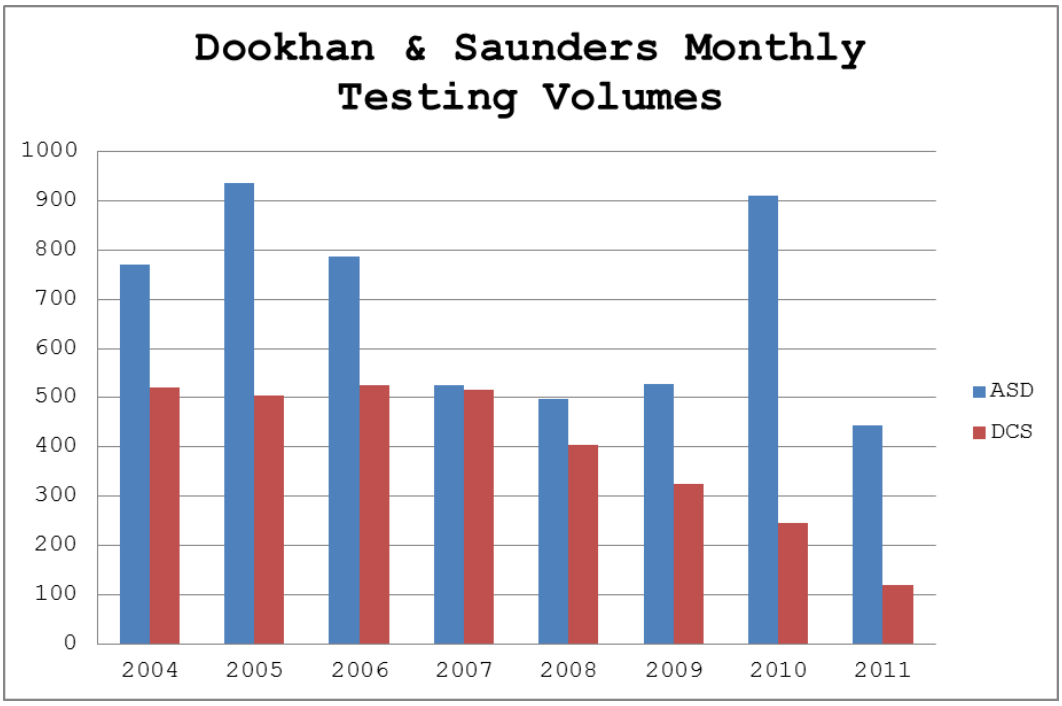

Chart III. Dookhan & Saunders Monthly Testing Volumes. Data derived from Pivot Tables (R.A. 152-62).

When expressed in terms of annual volume as Chart IV illustrates, the data also reveals that, but for 2007, a year in which Dookhan tested samples for only 11 months, Dookhan's productivity at the lab far outstripped that of Saunders (R.A. 152-62); *see Chart IV*. Of further note, is Saunders' downward trend following the issuance of the United States' Supreme Court decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) which reduced chemists' available testing time (R.A. 44, 152-62). This trend is particularly notable when juxtaposed with that of

Dookhan, whose productivity increased nearly twofold (R.A. 159-61). That trend continued into 2011; when Dookhan was removed from testing duties, she was on pace to test nearly 9,000 samples -- more than six-times Saunders' productivity (R.A. 161).

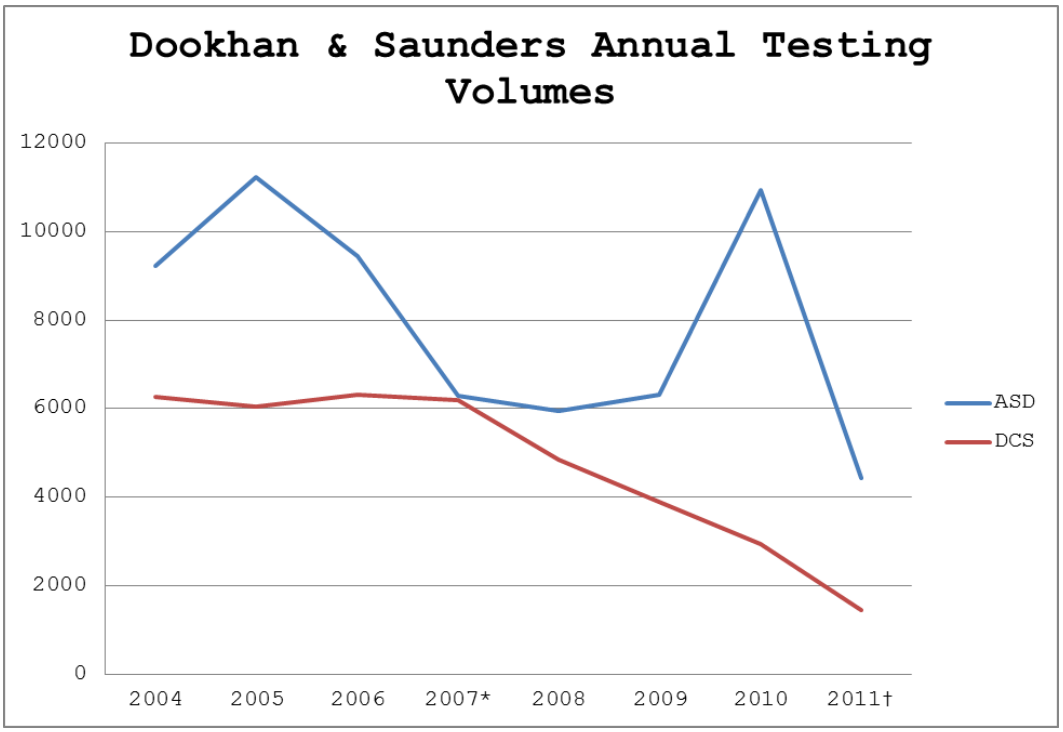

Chart IV. Dookhan & Saunders Annual Testing Volumes. Data derived from pivot tables (R.A. 152-62). * in 2007, Dookhan worked only eleven months; † after June 2011 Dookhan tested only eighty-three samples (R.A. 159, 161).

ARGUMENT

I. THE YEARS-LONG INVESTIGATIONS INTO THE HINTON LABORATORY CONDUCTED BY THE MASSACHUSETTS STATE POLICE, ATTORNEY GENERAL, AND INSPECTOR GENERAL, WHICH FEATURED INTERVIEWS OF SCORES OF EMPLOYEES, REVIEW OF HUNDREDS OF THOUSANDS OF PAGES OF DOCUMENTS, REVIEW OF 10,821 MULTI-RUN SAMPLES, INCLUDING RE-TESTING THROUGH RAMEN SPECTROSCOPY OF 1,203 SAMPLES, AND INDEPENDENT GC/MS RE-TESTING OF 609 SAMPLES, WAS CONSTITUTIONALLY ADEQUATE.

The defendant claims, contrary to the reality of the diligent years of effort by many different agencies, that the investigation into the Hinton Laboratory was insufficient (D. Br. 24-5). Where there is evidence of wrongdoing by a member of the prosecution team, the Commonwealth has a duty to conduct a "thorough investigation to determine the nature and extent of [the] misconduct, and its effect both on pending cases and on cases in which defendants already had been convicted". *Ware*, 471 Mass. at 95. The defendant acknowledges that an investigation was conducted, but alleges that the investigation was constitutionally inadequate (D. Br. 29). The defendant's baseless claim ignores the multi-agency investigations that included scores of witness interviews, multiple grand juries, the review of

hundreds of thousands of documents, and the thousands of re-tested samples.

While the duty to investigate is rooted in the Commonwealth's obligation "to learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team'", *Ware*, 471 Mass. at 95 *(quoting Commonwealth v. Beal*, 429 Mass. 530, 532 (1999)), "a prosecutor has no duty to investigate every possible source of exculpatory information on behalf of the defendant[] and . . . his obligation to disclose exculpatory information is limited to that in the possession of the [prosecution team]". *Commonwealth v. Campbell*, 378 Mass. 680, 702 (1979).

While it is well established that the prosecution team extends to chemists working in state drug laboratories, *see e.g. Scott*, 467 Mass. 336; *Ware,* 471 Mass. 85; *Cotto*, 471 Mass. 97, there are few cases which address the substantive adequacy of the government's investigation. Our *Brady* jurisprudence, as is the case with that of the federal circuits and our sister states, grapples with the question of how the prosecution team should be defined. *See generally Brady v. United States*, 397 U.S. 742 (1970);

see also Commonwealth v. Martin, 427 Mass. 816, 823 (1998) (duty extends to those who participate in investigation and evaluation of case and report to prosecutor's office); *Commonwealth v. Woodward*, 427 Mass. 629, 679 (1998) (where legislature contemplated coordination between agencies); *United States v. Jocelyn*, 206 F.3d 144, 154 (1st Cir. 2000) (prosecution team does not extend to cooperating private parties); *Barnett v. Superior Court*, 237 P.3d 980, 987 (Cal. 2010) (discussing out-of-state law-enforcement agencies). Notwithstanding this focus, federal jurisprudence rooted in the rationale of *Brady* is instructive relative to the depth of the government's search.

In *United States v. Brooks*, the court recognized that there was no requirement that the government take "a mere shot in the dark", but instead asked "whether there was enough of a prospect of exculpatory materials to warrant a search". 966 F.2d 1500, 1503-4 (D.C. Cir. 1992). When such a prospect exists, and the information is accessible and available, the government is obliged to seek it. *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973)

(overruled on other grounds, *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984)). This requirement is echoed in our rules of professional conduct: "The prosecutor in a criminal case shall . . . not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused". Mass. R. Prof. C. 3.8TA \l "Mass. R. Prof. C. 3.8" \s "Mass. R. Prof. C. 3.8" \c 4 **}**(j).

Likewise, in the context of potentially perjured testimony and the prosecutor's duty to "correct what he knows to be false", *Napue v. Illinois*, 360 U.S. 264 269-70 (1959), "the prosecutor must at least investigate". *Morris v. Yist*, 477 F.3d 735, 744 (9th Cir. 2006). When placed on notice of "the real possibility of false testimony" that duty should be discharged with a "diligent and good faith attempt [rather than] refusing to search for the truth and remaining willfully ignorant of the facts." *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001). Notwithstanding this obligation, *Brady* "does not require the government to create exculpatory material that does not exist."

United States v. Sukumolachan, 610 F.2d 685, 688 (1980).

Here, in stark contrast to the defendant in *Beal's* "concern about prosecutors keeping themselves willfully ignorant of potentially exculpatory information", *Beal*, 429 Mass. 530, 534 n.4, several investigative bodies conducted searching and unflinching inquiries into both the misconduct at the Hinton Laboratory, and its managerial and operational shortcomings.

Almost immediately upon the transfer of the Hinton Laboratory to State Police control in July 2012, the Massachusetts State Police began to investigate testing practices at the laboratory (R.A. 33). St. 2012, c. 139, § 190 (transferring testing responsibilities to State Police). That investigation began after chemists at the lab expressed concern over Dookhan's practices and the State Police learned of a prior Department of Public Health run investigation (R.A. 33; C.A. 353). In other words, the State Police, recognizing the inadequacy of the internal inquiry conducted by the Department of Public Health, did not choose "to turn a

blind eye", but rather sought to re-open the inquiry in order to discover the full scope of the misconduct (C.A. 353). *See United States v. Olsen*, 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing *en banc*). They did so by assigning the commander of the Attorney General's State Police Detective Unit, a twenty-eight year veteran with a broad range of investigatory experience, to lead the investigation (C.A. 345).

The State Police interviewed dozens of witnesses, including: Reczkowski, Tran, Saunders, Salemi, Lawler, Piro, Sprague, O'Brien, Lleshi, Glazer, Phillips, Medina, Corbett, Frasca, McCarthy, Lipchus, Desjardins, Ifezue, John Donovan, Haynes, Hanchett, Farak, Pontes, Salem, Giguere, Jaszek, Lacroix, Stevenson, Dookhan, Gao, Tan, Fuller-Jones, Zanolli, and Servizio (C.A. 237-328). Of particular significance was the deftness with which these seasoned investigators approached the interview of Dookhan. The troopers chose to approach her only after their probe equipped them with the knowledge necessary to reveal her misconduct (C.A. 237, 303). Their highly skilled approach yielded the voluntary

and intelligent confession which was the key to uncovering her misconduct at the lab (C.A. 309).

The investigation continued into the grand jury, where the grand jurors received the testimony of several witnesses and nearly 1,000 pages of exhibits (C.A. 334-543). At the conclusion of the Attorney General's investigation, the investigators had thoroughly plumbed the depths of Dookhan's misconduct. In addition to dry-labbing, the evidence showed that Dookhan had forged initials (C.A. 237, 240, 277, 403-6, 440), failed to adequately tare her balance (C.A. 255), and misrepresented her academic credentials (C.A. 373-4). At every turn, the investigators followed where the evidence led them.

While the State Police investigation was ongoing, then-Governor Patrick recognized the need for an independent inquiry into the management and operation of the laboratory (R.A. 29). As such, the governor asked the OIG to conduct the investigation (R.A. 29). The inspector general is an independent officer appointed to five year terms by a majority vote of three independent elected officers: the attorney general, the state auditor, and the governor.

G.L. c. 12A, § 2. The inspector general is appointed "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, investigation or criminal justice administration." *Id.* He may only be removed for cause by a majority vote of the same appointing authorities. *Id.*

Accordingly, in November 2012 the inspector general began "an independent, top-to-bottom review of the Drug Lab" (R.A. 29). To do so he engaged in a comprehensive review of the operation and management of the lab from 2002–2012 "to determine whether any chemists, supervisors or managers at the Drug Lab committed any misfeasance or malfeasance that may have impacted the reliability of drug testing" (R.A. 29).

Over the course of the subsequent fifteen months the inspector general "reviewed more than 200,000 documents including, but not limited to, lab records, retesting data and results, emails and internal memoranda" (R.A. 29). The inspector general supplemented this review of technical data with

interviews of "more than forty individuals associated with the lab, most of them under oath" (R.A. 29).

After a review of this tremendous body of evidence, the inspector general concluded, *inter alia*:

> 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. The OIG found no evidence that Dookhan tampered with any drug samples assigned to another chemist even when she played a role in confirming another chemist's test results

(R.A. 29). Significantly, no additional criminal charges were issued by either the attorney general or the United States attorney, strongly suggesting the inspector general found no further wrongdoing as he is statutorily mandated to report to those bodies should he have "reasonable grounds to believe there has been [a] violation of federal or state criminal law". G.L. c. 12A, § 10.

Had the inspector general stopped at that point, the defendant's claim that the investigation was inadequate would be divorced from reality. Notwithstanding the inspector general's fifteen-month probe and the issuance of a 50,000 word report, he

continued his investigation by scrutinizing the multi-run samples "includ[ing] the laboratory work of all the chemists who worked in the drug lab from 2002-2012, as well as all classes of controlled substances that the drug lab had tested" (R.A. 40).

To accomplish this highly technical analysis of the GC/MS data of 10,821 multi-run samples, he reviewed: "(1) the control cards; (2) the control sheets; (3) the powder sheets; (4) both handwritten and typed batch sheets; and (5) any other documents associated with each sample, including the drug receipt and, if available, the certificate of analysis" (R.A. 240-1). The inspector general utilized two consultants: Jack Mario, a leader in the forensic science community with thirty years' experience, including ten years running an accredited forensic lab (R.A. 241), and Michael Wolf, a former assistant director of the FBI, with extensive history reviewing troubled laboratories (R.A. 241).

To supplement the review of the technical data, the inspector general ordered extensive testing on "multi-run" samples, i.e. the samples most susceptible to misconduct or testing inaccuracies (R.A. 239). In

all, 1,203 samples were analyzed using ramen spectroscopy (R.A. 241) and a further 609 samples were sent for independent GC/MS analysis to ASCLD/LAB accredited NMS Labs in Pennsylvania (R.A. 245-6). Following the analyses of the multi-run samples, the OIG concluded that there were no "widespread testing inaccuracies" (R.A. 261). To characterize this investigation as anything but thorough is risible.

Lastly, the investigation surrounding misconduct at the Amherst laboratory augmented and complimented the investigations of the Hinton Laboratory. The attorney general's initial investigation focused on the immediate actions which led to Farak's arrest, namely her theft of controlled substances from the Amherst laboratory in January 2013 (C.A. 546-54). Following the order from this Court in *Cotto*, 471 Mass. 97, the attorney general opened a grand jury investigation to "determine the timing and scope of Farak's misconduct" beyond her actions in January 2013 (R.A. 181). The investigation was conducted by two assistant attorneys general and the Honorable Peter Velis, a retired Superior Court judge acting as a special assistant attorney general (C.A. 928). To

that end, the grand jury received testimony from Farak (C.A. 929-1129, 1133-1279, 1284-1353), Hatchet (C.A. 1358-1469), Salem (C.A. 1474-1534), Pontes (C.A. 1534-87), and Brooks (C.A. 1592-1642).

The Caldwell investigation sought and obtained an order of immunity for Farak in order to explore fully her misconduct (C.A. 930-1). The evidence showed that before she began her work at the Department of Public Health, Farak was a recreational user of marijuana and had once tried cocaine and heroin (R.A. 185; C.A. 980-1). In May 2003, Farak began work at the Hinton Laboratory's drug lab (R.A. 183-4; C.A. 937-8). Farak transferred to the Amherst lab in August 2004 (R.A. 184; C.A. 957). Importantly, as it pertains to the defendant's claim, it was only after her transfer to Amherst, sometime in late 2004 or early 2005, that she sampled the methamphetamine standard stored at the Amherst laboratory (R.A. 185; C.A. 982-3, 997, 1117, 1307, 1339).[3] At no time had she tried the standards at the Hinton laboratory (C.A. 983, 986, 997, 1117,

[3] Farak's therapists' contemporaneous notes corroborated her grand jury testimony relative to the date she began taking from laboratory standards (C.A. 1142-3, 1165).

1339), nor did she have access to them (C.A. 983). She also never took from police submitted samples at the Hinton Laboratory (C.A. 1015, 1139).

The interview of Dookhan, who shared a cordial and professional relationship with Farak for the brief time they overlapped, corroborated Farak's testimony (R.A. 229; C.A. 955). Farak never discussed recreational drug use with Dookhan (R.A. 229-30), nor did she ever appear under the influence of narcotics (R.A. 230). Unlike the standards at Amherst, which were accessible in a refrigerator (C.A. 971), Dookhan told investigators that only Salemi or Piro had access to the standards at the Hinton Laboratory (R.A. 230; C.A. 983-4).

When evaluating the thoroughness of the Caldwell investigation, the sworn testimony of Farak is critical. At the time of the *Ware* decision, this Court noted, in connection with the limited nature of the initial investigation, that it was significant that "Farak has not provided any details concerning the timing and scope of her misconduct". 471 Mass. 85, 93 n.12. By seeking and securing a judicial order of immunity, the Caldwell investigation broke through

what would have been an insurmountable roadblock in the investigation in order to increase the accessible and available information. *Deutsch*, 475 F.2d 55.

The defendant's unfounded claim that the investigation of the Hinton Laboratory was inadequate requires this Court to ignore the evidence. The defendant's argument follows the following chain of reasoning: 1) Farak engaged in misconduct at Amherst; 2) Farak must therefore have engaged in the same misconduct at the Hinton Laboratory; 3) the investigation failed to uncover Farak's misconduct at the Hinton Laboratory; 4) therefore the investigation was inadequate. This syllogism, in addition to the deficiencies of its own internal logic, is fatally flawed as it relies upon a false premise: that Farak engaged in misconduct at the Hinton Laboratory.

There is no evidence Farak engaged in misconduct while at the Hinton Laboratory, but rather merely evidence that she was a recreational user of marijuana (R.A. 185; C.A. 980-1). Under any reasonable view, recreational drug use does not rise to the level of misconduct, nor is it atypical behavior; the Centers for Disease Control reported in 2015 that nearly one

in four individuals aged 18-25 (Farak's age at the time she was at the Hinton Laboratory) had used an illicit drug in the previous thirty days. Centers for Disease Control and Prevention, *Health, United States, 2016*, p. 213.

The defendant's claim ignores the extensive efforts of the Massachusetts State Police, the Office of the Inspector General, and Assistant Attorney General Caldwell's team. By starting at his conclusion and focusing only on the "facts" that support it, the defendant exhibits precisely the willful blindness he wrongly and baselessly accuses the investigators of and his claim must be rejected.

II. THE MOTION JUDGE PROPERLY EXERCISED HER DISCRETION IN DENYING THE DEFENDANT'S MOTION TO DISMISS WHERE HE ALLEGED NOTHING MORE THAN SPECULATIVE MISCONDUCT GROUNDED UPON THE PILING OF INFERENCE UPON INFERENCE.

Throughout his claim, the defendant raises the specter of undisclosed misconduct in the testing of his evidence. The defendant's argument obfuscates a critical fact surrounding his case: the evidence was tested by neither Farak nor Dookhan (R.A. 211). In his search for misconduct, the defendant falls prey to a sort of legal pareidolia -- finding the patterns and

significance he wishes to see in the data. To that end, he alleges that Saunders' testing volumes "indicate" that she, like Dookhan, engaged in dry-labbing (D. Br. 38), and that the inspector general sought to conceal this misconduct (D. Br. 35). His claim has no support in the evidence and must be rejected.

While captioned as a "Motion to Vacate and for the Sanction of Dismissal", the defendant's motion was fundamentally a motion for new trial (R.A. 16-8; C.A. 1-181). The determination of a motion for new trial is dedicated to the sound discretion of the trial judge. *Commonwealth v. Medina*, 430 Mass. 800, 802 (2000); *Commonwealth v. Stewart*, 383 Mass. 253, 257 (1981). Hence, as the defendant concedes (D. Br. 34), this Court should review the judge's decision only for an abuse of discretion. *Commonwealth v. Rebello*, 450 Mass. 118, 130 (2007); *Commonwealth v. Candelario*, 446 Mass. 847, 858 (2006). Where the defendant's claim has no basis in fact or law, the motion judge exercised sound discretion in denying it.

The human cognitive system has evolved to detect patterns in the environment in order to predict important outcomes and, eventually, optimize behavior; we are naturally biased in order to not overlook any meaningful pattern, even if this means that false alarms will occur, as when we detect a causal link between two events that are actually unrelated. Fernando Blanco, *Positive and negative implications of the causal illusion*, 50 Consciousness and Cognition, April 2017, 56-68 (2017). This phenomenon, described as apophenia, results in a tendency to perceive meaning in unrelated events. Sophie Fyfe, Claire Williams, Oliver J. Mason, Graham J. Pickup, *Apophenia, theory of mind and schizotypy: Perceiving meaning and intentionality in randomness*, 44 Cortex 10, 1316 (2008). This error in cognition is exacerbated by confirmation bias, i.e. the general tendency for people to believe too much in their favored hypothesis even in the face of evidence which should otherwise erode the confidence and tenacity of their belief. Joshua Klayman, *Varieties of Confirmation Bias*, 32 Psychology of Learning and

Motivation, 385-418 (1995). The defendant's claim exhibits precisely this failure of cognition.

The defendant claims, notably without citation to the record, that "Saunders' number of reported results were comparable to the exceptionally-high" volume of samples reported by Dookhan (D. Br. 38). This factual claim serves as the foundation for his inference that there was a "reasonable possibility that Saunders engaged in comparable conduct" (D. Br. 38). An objective review of the data shows that there is, in fact, no comparison. During the years they worked together, Saunders tested a total of 37,945 samples against Dookhan's total of 63,876 (R.A. 157-61). Expressed differently, Dookhan tested over sixty-five percent more samples than Saunders during that time period, notwithstanding the fact that the time period includes the six months after which Dookhan's testing duties had been revoked (R.A 161), and three months from 2006–2007 when she was not testing samples (R.A. 159-60). To characterize their volumes as "comparable" is, at best, misleading.

When viewed through the prism of monthly averages, the pattern of Dookhan's productivity far

outstripping that of Saunders continues. Dookhan's monthly averages, controlling for months in which she did not test, were nearly double that of Saunders' (R.A. 152-62). The defendant places great emphasis on 2007, claiming "Ms. Saunders nearly reported more test results than did Ms. Dookhan" (D. Br. 21). Placing the data in context reveals that, in fact, Dookhan's testing volume in 2007 was one-third less than that which she reported in 2006, and nearly half that reported in 2005 (R.A. 157-9).[4] The defendant's argument suggests 2007 represented an anomalous and statistically significant spike in Saunders' productivity when, in fact, it represented a deep decline in Dookhan's volume.

The defendant also describes the relative testing volumes of Dookhan, Farak, and Saunders in 2004 as "remarkable" (D. Br. 21). The defendant fails to provide any indication about what is remarkable about these volumes, apparently asking this Court to infer misconduct merely because the volumes were within twenty percent of one another (R.A. 157-8). Yet the

[4] As noted *supra* at *Chart IV*, Dookhan's 2007 testing volume was also achieved in only eleven months of work.

only thing remarkable about these numbers is that two novice chemists out-paced Saunders, a veteran of over twelve years (R.A. 157-8).

Saunders' full body of work, when placed in context, shows no indication of "comparable conduct". Their respective testing volumes following the United States' Supreme Court decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) is illustrative. As Saunders' available time at her bench decreased, so too did her testing volume, in stark contrast to Dookhan whose productivity nearly doubled (R.A. 160-1; C.A. 1003-5). By the mid-point of 2011, when Dookhan was removed from testing duties, she was on pace to test nearly 9,000 samples -- more than six-times the productivity of Saunders (R.A. 161).

The defendant ignores the obvious and far less insidious explanations for Saunders testing volumes. While Saunders was certainly a productive employee, one would expect as much from a chemist who began working in 1989 and, at the time of the closing of the Hinton Laboratory, had over two decades of testing experience (R.A. 152-61). Furthermore not all

"samples" required the same level of effort and time to analyze. As Farak explained to the grand jury: "The samples I could analyze more quickly just because like one piece of evidence could be one bag or it could be like 10,000 glassine bags, it's still considered one piece of evidence but obviously you're going to analyze more than one bag" (C.A. 947; *see also* C.A. 953-4, 968, 1034-5, 1312-3). The raw sample volume is further degraded in significance in light of the fact that a "number of chemists tested only certain types of drugs based on their individual preferences" (R.A. 49, 111).

The defendant's claim, clouded by his own confirmation bias and the natural human tendency to see patterns and causal links which support his beliefs, asks this Court to draw inferences which are unsupported by the evidence. *Cf. Corson v. Commonwealth*, 428 Mass. 193, 198 (1998) (in context of sufficiency, inadequacy of piling inference upon inference and speculation or conjecture). This Court has refused to "heap inference upon inference" in the drug lab context before, and it should do so again. *Scott*, 467 Mass. at 358.

Yet, based solely on the unfounded inferences he draws from the testing volumes, the defendant alleges the inspector general deliberately sought to "minimize the understanding of the nature and extent of the problems at the Hinton Laboratory" (D. Br. 36), and that the inspector general's conclusions were "egregiously and willfully misleading" (D. Br. 37). If the axiom that "a wise man . . . proportions his belief to the evidence" holds true, there is no wisdom in the defendant's belief. Hume, David. *An Enquiry Concerning Human Understanding.* Vol. XXXVII, Part 3. The Harvard Classics. New York: P.F. Collier & Son, 1909–14, § 10, Of Miracles, Part 1, p. 4. Indeed, this Court has described the investigation at the Hinton Laboratory as a "broad formal investigation" and a "thorough investigation". *Cotto*, 471 Mass. at 111-2. This Court has also described the inspector general's investigation as "comprehensive" and noted, in stark contrast to the defendant's claim that the report minimized understanding, that it "*greatly enhanced public understanding* of the details surrounding Dookhan's misconduct". *Commonwealth v. Resende*, 475 Mass. 1, 6-7 n.8 (2016) (emphasis added).

This Court was sufficiently impressed with the quality of the investigation to give it great weight in its decisions in *Resende*, *Id.* at 14, and *Bridgeman v. Dist. Atty. for Suffolk County ("Bridgeman II")*, 476 Mass. 298, 303 n.6 (2017).

Rather than inventing patterns of misconduct in the data, this Court, particularly in the absence of any evidence to the contrary, should find that the inspector general, consistent with his statutory mandate, discharged his duties in good faith when he sought to "determine whether any chemists, supervisors or managers at the Drug Lab committed any misfeasance

or malfeasance" (R.A. 29);[5] and that ultimately, after an exhaustive investigation and a review of all the data, including the testing volumes the defendant places so great an emphasis on, concluded Dookhan was the "sole bad actor" (R.A. 29).

III. THE DEFENDANT'S APPEAL MUST BE DISMISSED AS HE HAS NOT RECEIVED A FINAL ORDER IN THE TRIAL COURT AND HIS CLAIM IS NOT RIPE WHERE THE FACTUAL RECORD IS INCOMPLETE, HE SUFFERS NO HARDSHIP, AND THE MOTION JUDGE, IN HER ALLOWANCE OF THE DISCOVERY ORDER, INTENDED TO REVISIT THE DEFENDANT'S CLAIM AFTER DISCOVERY COMPLIANCE.

The defendant's claims are premature as he has not suffered an adverse final order below. Our rules of criminal procedure permit an appeal from a "final order". Mass. R. Crim. P. 30(c)(8). Here the

[5] The defendant, in describing the inspector general's investigation, identifies as the "key to [his] argument" the failure of the inspector general to describe "any inquiry concerning whether others, besides Ms. Dookhan, engaged in behavior similar to her malfeasance" (D. Br. 32). The self-described "key" to the defendant's argument fails him in two important respects: first, the "exhaustive list" he identifies in the inspector general's report is, in fact, merely section headings and is at no time described as exhaustive (D. Br. 32), second, merely because the report does not provide individualized exonerations does not lead to the conclusion that no such investigation was conducted in the same way that the failure of the Boston Police to identify every area of the defendant's vehicle where they did not find narcotics does not mean they did not look (C.A. 207-8).

defendant's motion for new trial has never been ruled upon (R.A. 12), and as such he has no right of appeal. His remedy, as the motion judge anticipated, was to present his claim anew after completion of the discovery process (R.A. 410). Accordingly, his appeal should be dismissed.

In any event, his claims are unripe. "As a general rule, this [C]ourt will not review [a] matter until the entire case is ripe for review due to the burdensome nature of 'piecemeal appellate review.'" *Campana v. Board of Directors of Massachusetts Housing Finance Agency*, 399 Mass. 492, 515 at n. 16 (1987). With regard to constitutional questions, the "'traditional and salutary practice'" of the Commonwealth's appellate courts "is not to answer them in the abstract [but] to wait 'until the circumstances of a case are established' that require an answer to such questions." *Commonwealth v. Bankert*, 67 Mass. App. Ct. 118, 121 (2006), *quoting Commonwealth v. Two Juveniles,* 397 Mass. 261, 264 (1986); *See also Commonwealth v. Casimir*, 68 Mass. App. Ct. 257, 259-60 (2007) (in motion for new trial context, defendant's claim not ripe when he has made no showing that he is

actually facing any of the consequences complained of in his motion).

Ripeness is determined by reviewing "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Doe v. Bush*, 323 F.3d 133, 138 (1st Cir. 2003) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). As to the fitness prong of the analysis, while a purely legal question lends itself to fitness for justiciability, *Ernest & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 536 (1st Cir. 1995), that is not the case where further factual development would significantly aid the court in resolving the dispute. *Doe v. Bush*, 323 F.3d at 138-9. The hardship analysis considers "whether the challenged action creates a 'direct and immediate' dilemma for the parties." *Stern v. United States Dist. Court*, 214 F.3d 4, 10 (1st Cir. 2000).

The defendant's claim satisfies neither the fitness nor hardship prongs. Here, action on the defendant's motion for new trial was deferred and the motion judge, in her ruling on the defendant's discovery motion, clearly intended that the parties

return to her following discovery compliance (R.A. 411). For the same reasons the motion judge ruled that she could not "fairly rule [on the motion] without certain limited discovery about chemist Saunders and her work", this Court likewise cannot consider the defendant's claims absent a more complete factual record which will cast light on the defendant's shadowy and amorphous claims of misconduct and conspiracy.

Further, the issues presented here differ significantly from those presented in *Bridgeman v. Dist. Atty. for the Suffolk Dist. ("Bridgeman I")*, 471 Mass. 465 (2015). In *Bridgeman I*, this Court considered "the significance of [the] case in light of the thousands of defendants who have been affected by Dookhan's misconduct and now are considering whether to pursue postconviction relief. . ." *Id.* at 474. Here, the defendant is not laboring under any sense of apprehension or confusion as to the state of the law. Indeed, unlike the situation presented in *Stern,* where failing to decide the issue "would put [the plaintiff] on the horns of a dilemma," 214 F.3 at 11, the defendant faces no such choice. Likewise, this is not

a situation where the defendant is forced to disobey a judicial order or risk some sanction in order to pursue his claim. *Commonwealth v. Liang*, 434 Mass. 131, 133 (2001); see *also Dist. Atty. for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 509 n.3 (1995).

At best, the defendant is entitled to an opportunity to explore the factual claims he raises, precisely as Judge Roach intended to permit him to do. Litigating his claim will result in precisely the type of burdensome "piecemeal appellate review" our justiciability doctrine seeks to avoid. *Campana,* 399 Mass. at 499 n.16. For these reasons, the defendant's appeal should be dismissed as it does not present a ripe claim.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the motion judge's ruling or, in the alternative, dismiss the defendant's appeal.

Respectfully submitted
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ADDENDUM

Fourteenth Amendment to the Constitution of the United States

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection

or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article XII of the Massachusetts Declaration of Rights

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

G.L. c. 12A, § 2. Establishment of office; appointment and removal of inspector general

There is hereby established an office of inspector general, hereinafter called the office. There shall be in said office an inspector general, who shall be the administrative head of said office and who shall be appointed by a majority vote of the attorney general, the state auditor and the governor for a term of five years. The person so appointed shall be selected without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, investigation or criminal justice administration.

In case of a vacancy in the position of inspector general his successor shall be appointed in the same manner for the unexpired term. No person shall be appointed for more than two five-year terms.

The person so appointed may be removed from office, for cause, by a majority vote of the attorney general, the state auditor, and the governor. Such cause may include substantial neglect of duty, gross misconduct or conviction of a crime. The reasons for removal of the inspector general shall be stated in writing and shall include the basis for such removal. Such writing shall be sent to the clerk of the senate, the clerk of the house of representatives and to the governor at the time of the removal and shall be deemed to be a public document.

G.L. c. 12A, § 10. Reports to attorney general or United States attorney

In carrying out his duties and responsibilities, the inspector general shall report to the attorney general, the United States attorney, or both, whenever the inspector general has reasonable grounds to believe there has been violation of federal or state criminal law. Said attorney general shall institute appropriate further proceedings.

When authorized by a majority vote of the inspector general council, the inspector general shall refer audit or investigative findings to the state ethics commission, or to any other federal, state or local agency, which has an interest in said findings.

Any referrals made under this section shall not be made public.

G.L. c. 94C, § 32E. Trafficking in marihuana, cocaine, heroin, morphine, opium, etc.; eligibility for parole

* * * *

(b) Any person who trafficks in a controlled substance defined in clause (4) of paragraph (a), clause (2) of paragraph (c) or in clause (3) of paragraph (c) of Class B of section thirty-one by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth a net weight of 18 grams or more of a controlled substance as so defined, or a net weight of 18 grams or more of any mixture containing a controlled substance as so defined shall, if the net weight of a controlled substance as so defined, or any mixture thereof is:

* * * *

(4) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than 12 nor more than twenty years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 12 years and a fine of not less than fifty thousand nor more than five hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

* * * *

St. 2012, c. 139, § 190

(a) Notwithstanding any general or special law to the contrary, this section shall facilitate the orderly transfer of certain employees, proceedings, rules and regulations, property and legal obligations of the department of public health, as the transferor agency, to the department of state police, as the transferee agency.

(b) Subject to appropriation and chapter 22C of the General Laws, the employees of the laboratories of the department of public health that analyze illicit and seized substances for law enforcement purposes, including those employees who immediately before the effective date of this act hold permanent appointment in positions classified under chapter 31 of the General Laws or have tenure in their positions as provided in section 9A of chapter 30 of the General Laws or do not hold such tenure, or hold confidential positions, are hereby transferred to the department of state police, without interruption of service within the meaning of said section 9A of said chapter 30, without impairment of seniority, retirement or other rights of the employee and without reduction in compensation or salary grade, notwithstanding any change in title or duties resulting from such transfers and without loss of accrued rights to holidays, sick leave, vacation and benefits, and without change in union representation or certified collective bargaining unit as certified by the state labor relations commission or in local union representation or affiliation. Any collective bargaining agreement in effect immediately before the transfer date shall continue in effect and the terms and conditions of employment in that agreement shall continue as if the employees had not been so transferred. The transfer shall not impair the civil service status of any such reassigned employee who immediately before the effective date of this act either holds a permanent appointment in a position classified under said chapter 31 or has tenure in a position pursuant to said section 9A of said chapter 30.

Notwithstanding any general or special law to the contrary, all such employees shall continue to retain their right to collectively bargain under chapter 150E of the General Laws and shall be considered employees of the department of state police for the purposes of said chapter 150E.

Nothing in this section shall be construed to confer upon any employee any right not held immediately before the date of said transfer, or to prohibit any reduction of salary grade, transfer, reassignment, suspension, discharge, layoff or abolition of position not prohibited before such date.

(c) All petitions, requests, investigations and other proceedings appropriately and duly brought before the laboratories of the department of public health that analyze illicit and seized substances for law enforcement purposes or duly begun by such laboratories and pending before them prior to the effective date of this act, shall continue unabated and remain in force, but shall be assumed and completed by the department of state police.

(d) All orders, rules and regulations duly made and all approvals duly granted by the laboratories of the department of public health that analyze illicit and seized substances for law enforcement purposes, which are in force immediately before the effective date of this act, shall continue in force and shall thereafter be enforced, until superseded, revised, rescinded or canceled, in accordance with law, by the department of state police or the department of public health.

(e) All books, papers, records, documents, equipment, buildings, facilities, cash and other property, both personal and real, including all such property held in trust, which immediately before the effective date of this act are in the custody of the laboratories of the department of public health that analyze illicit and seized substances for law enforcement purposes, shall be transferred to the department of state police, to the extent agreed by both departments.

(f) All duly existing contracts, leases and obligations of the laboratories of the department of public health entered into to enable the analysis of illicit and seized substances for law enforcement purposes shall continue in effect, but shall be assumed by the department of state police. No existing right or remedy of any kind shall be lost, impaired or affected by this act.

(g) All references in any general or special law, regulation, contract or other document to the laboratories of the department of public health that analyze illicit and seized substances for law enforcement purposes or to a principal officer thereof shall be taken to refer to the department of state police or to a principal officer of that department.

Mass. R. Crim. P. 30: Postconviction Relief

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(c) Post Conviction Procedure.

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(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

> (A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.
>
> (B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after

entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

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Mass. R. Prof. C. 3.8: Special Responsibilities of a Prosecutor

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(j) When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.

* * * *

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k).

VINCENT J. DEMORE
Assistant District Attorney

No. SJC-12430

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

_____

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

JUSTINO ESCOBAR,
Defendant-Appellant.

_____

COMMONWEALTH'S BRIEF

_____

SUFFOLK COUNTY