COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SJC 11465

No. 2013-P-0382

COMMONWEALTH OF MASSACHUSETTS,
Appellant,

V.

RAKIM SCOTT,
Defendant-Appellee

BRIEF AND APPENDIX FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE BOSTON MUNICIPAL COURT

SUFFOLK COUNTY

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MAY 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

ISSUES PRESENTED

I. Whether the motion judge improperly allowed the defendant's motion to vacate his guilty plea where the defendant pled intelligently and voluntarily and where he failed to present any proof of misconduct in his case.

A. Whether the motion judge improperly allowed the defendant's motion to vacate his guilty plea where the defendant waived his claim that the Commonwealth failed to provide "true and accurate" discovery in violation of *Brady v. Maryland* when he tendered his plea of guilty; the defendant has made no showing that, in fact, the Commonwealth failed to provide "true and accurate" discovery; the Commonwealth is under no obligation to provide impeachment evidence prior to a defendant's change of plea; and, in any event, the Commonwealth did not suppress exculpatory evidence.

STATEMENT OF THE CASE

On April 5, 2011, the clerk's office of the Dorchester Division of the Municipal Court Department issued a complaint charging the defendant with

possession of a class (B) controlled substance, in violation of G.L. c. 94C, § 34 (R.A. 1).[1] On September 20, 2011, the defendant came before Judge Coyne (R.A. 3). After a full colloquy, at which he was represented by competent counsel, the defendant admitted to sufficient facts to warrant a finding of guilt (R.A. 3). In consideration of the defendant's change of plea, the court continued the matter without a finding for a period of 12 months (R.A. 3).

On December 7, 2012, the defendant filed a motion to withdraw his plea (R.A. 4, 12-13). The defendant's motion was supported by an affidavit of counsel (R.A. 14). The defendant's motion raised two claims: 1) "[a]s a result of the chemist's misconduct, the defendant's admission to sufficient facts was not knowing and voluntary, and therefore violates the Fifth**Error! Bookmark not defined.** and Fourteenth Amendments and Article 12" (R.A. 12); 2) "[a]dditionally, the misconduct of Annie Dookhan and/or other employees of the Hinton State Laboratory, which is imputed to the Commonwealth . . . deprived

[1] References to the Commonwealth's Record Appendix will be cited as (R.A. __); references to the transcript will be cited by page number as (Tr. __).

[the defendant of] due process by . . . [the] fail[ure] . . . to provide true and accurate discovery prior to his admission to sufficient facts, in violation of the Fifth**Error! Bookmark not defined.** and Fourteenth Amendments and Article 12[.] Br*ady v. Maryland*, 373 U.S. 83 (1963)" (R.A. 12-13). The defendant did not submit any additional affidavits or supporting documents (R.A. 12-14).

On January 31, 2013 Judge Coyne heard oral argument on the defendant's motion, allowing the defendant's motion from the bench without written findings and rulings (R.A. 33; Tr. 11-12). On February 5, 2013, the Commonwealth filed its notice of appeal (R.A. 34).

STATEMENT OF FACTS

On April 4, 2011, officers arrested the defendant at 42 Harrison Archway after discovering he had two outstanding warrants for his arrest out of the Somerville District Court (R.A. 8). During the booking process, the officers found five rocks of crack cocaine on the defendant's person (R.A. 8). The narcotics in the defendant's case were tested at the Hinton Laboratory at Jamaica Plain (R.A. 9). The

evidence tested positive for the presence of cocaine, a class (B) substance (R.A. 9). Annie Dookhan was the custodial analyst and Lisa Glazer was the confirmatory analyst (R.A. 9). Subsequent to the analysis, an investigation was launched into the conduct of Annie Dookhan (R.A. 14).

IV. The Hinton Lab Investigation

The defendant made the following proffer in an affidavit of counsel relative to the Hinton Lab Investigation:

> The Commonwealth has acknowledged in the media, as well as in open court in other cases, that Annie Dookhan has been 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.
>
> Ms. Dookhan's drug analysis certifications are rendered suspect in that she has been accused by law enforcement officials of falsifying the weight and content of samples.

(R.A. 14). The defendant submitted no further documentation in support of his motion.

ARGUMENT

I. THE DEFENDANT'S MOTION WAS IMPROPERLY ALLOWED WHERE THE DEFENDANT PLED VOLUNTARILY AND INTELLIGENTLY AND WHERE HE FAILED TO PRESENT ANY PROOF OF MISCONDUCT IN HIS CASE.

"A defendant may obtain a new trial under Mass. R. Crim. P. 30(b), if it appears that justice may not have been done." *Commonwealth v. DeVincent*, 421 Mass. 64, 67 (1995) (internal quotations omitted); *accord Commonwealth v. Moore*, 408 Mass. 117, 125 (1990). "A motion for a new trial is addressed to the sound discretion of the trial judge." *Commonwealth v. Schand*, 420 Mass. 783, 787 (1995) (internal quotations omitted). "[The] defendant [has] the burden of showing prejudice warranting or requiring a new trial." *Id.* at 788 n.1.

"'In exercising the discretion to hold an evidentiary hearing, the judge must decide whether a substantial issue necessitating a hearing has been raised. In doing so, the judge looks not only to the seriousness of the claim presented, but also at the adequacy of the defendant's factual showing.'" *Commonwealth v. Shuman*, 445 Mass. 268, 278 (2005) (quoting *Commonwealth v. Trung Chi Truong*, 34 Mass.

App. Ct. 668, 674 (1993)). In a motion for new trial, the burden is on the defendant to prove facts that are "'neither agreed upon nor apparent on the face of the record.'" *Commonwealth v. Comita*, 441 Mass. 86, 93 (2004) (quoting *Commonwealth v. Bernier*, 359 Mass. 13, 15 (1971)). The motion judge erred when he failed to deny the defendant's motion without further hearing where, as here, the defendant raised no "substantial issue". *DeVincent*, 421 Mass. at 69; *Commonwealth v. Licata*, 412 Mass. 654, 660 (1992). At a minimum, had the defendant made a showing raising a substantial issue, the motion judge should have ordered an evidentiary hearing and to allow the defendant's motion absent an evidentiary hearing, where the defendant would have the opportunity to sustain his burden, was error. *Commonwealth v. Gordon*, 82 Mass. App. Ct. 389, 393-96 (2012).

A guilty plea may be withdrawn only when it does not appear affirmatively on the record that the plea was entered into voluntarily and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); *Commonwealth v. Furr*, 454 Mass. 101, 106 (2009); *Commonwealth v. Lopez*, 426 Mass. 657, 660 (1998);

Commonwealth v. Grant, 426 Mass. 667, 670 (1998), 440 Mass. 1001 (2003). New evidence relating to the circumstances surrounding the crime is not relevant to a motion to withdraw a guilty plea. A plea of guilty is an admission of the facts charged and "is itself a conviction. Like a verdict of a jury it is conclusive." *Kercheval v. United States*, 274 U.S. 220, 223-24 (1927); *accord Commonwealth v. Berrios*, 447 Mass. 701, 715 (2006) (defendant's admission that he is in fact guilty of the offense precludes challenge to deprivation of rights prior to entry of the plea); *Commonwealth v. Fanelli*, 412 Mass. 497, 500 (1992) ("'a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case'") (quoting *Commonwealth v. Stokes*, 18 Mass. App. Ct. 637, 641, *rev. denied*, 393 Mass. 1104 (1984)); *Kuklis v. Commonwealth*, 361 Mass. 302, 305 (1972).

Accordingly, new evidence is relevant to a motion to withdraw a guilty plea only if it sheds light on the defendant's ability to intelligently and voluntarily plead guilty. *See Commonwealth v.*

Conaghan, 433 Mass. 105, 109-11 (2000) (new evidence that defendant suffered from battered woman's syndrome was relevant to voluntariness of her guilty plea);[2] *cf. Commonwealth v. Duest*, 30 Mass. App. Ct. 623, 627-28 (1990) (rejecting a new evidence claim in a motion to withdraw a guilty plea where evidence was not newly discovered, but merely newly recollected), *rev. denied*, 410 Mass. 1103 (1991). As such, assuming that a plea is constitutionally proper, the defendant's admission that he committed the crimes charged against him is conclusive proof of guilt that outweighs any countervailing evidence.

Here, the defendant pled guilty and, in so doing, admitted in open court that he committed the charged offenses (R.A. 3). He had an opportunity to contest the facts presented by the Commonwealth during the plea or to exercise his right to trial, but chose neither option (R.A. 3). As such, he waived his right

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[2] In *Conaghan*, 433 Mass. at 110, the SJC remanded the case because the defendant's motion for a competency examination "raise[d] a serious question as to her mental competency to assist her attorney in establishing a defense and to plead guilty voluntarily." The new evidence described in *Conaghan* went only to the voluntariness of the plea and her ability to assist in her defense and not the issue of factual guilt.

to challenge the factual basis of his plea. *See Fanelli*, 412 Mass. at 500 ("A defendant's guilty plea, made knowingly, voluntarily and with the benefit of competent counsel, waives all nonjurisdictional defects in the proceedings prior to the entry of the guilty plea.") (citing *Lefkowitz v. Newsome*, 420 U.S. 283, 288 (1975) ("a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings")). The defendant's vague and general assertion that there is new evidence about the laboratory relates only to the circumstances surrounding the offense and his factual guilt, but has no bearing at all on the intelligence or volition of his plea, therefore his claim is irrelevant and cannot be the basis for vacating his guilty plea.

Here, the newly discovered evidence, which is not specific to the defendant's case, is not relevant to

the voluntary nature of the defendant's guilty plea.[3] A "plea is voluntary if entered without coercion, duress, or improper inducements." *Berrios*, 447 Mass. at 708 (citing *Brady v. United States*, 397 U.S. 742, 750, 755 (1970); *Duest*, 30 Mass. App. Ct. at 631). The defendant does not claim that his plea was the result of coercion, threats, or improper inducements (R.A. 12-14). "[T]hat the defendant felt that he had no choice but to plead guilty does not provide a proper basis to invalidate the plea[]." *Berrios*, 447 Mass. at 709 (citing *Commonwealth v. Quinones*, 414 Mass. 423, 436 (1993); *Commonwealth v. Morrow*, 363 Mass. 601, 606-07 (1973)). "[T]he stress inherent in entering guilty pleas . . . do[es] not necessarily render pleas involuntary." *Berrios*, 447 Mass. at 709. "[A] certain amount of psychological or emotional pressure (or coercion, if you will) 'is endemic to any system which asks a person to forgo certain rights in

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[3] A defendant tenders a plea "intelligently" if he has knowledge of the elements of the charges against him and of the procedural protections that he would forgo by pleading guilty. *Commonwealth v. Robbins*, 431 Mass. 442, 449-50 (2000); *Commonwealth v. Correa*, 43 Mass. App. Ct. 714, 717 (1997). The defendant made no claim that his plea was not intelligently made (R.A. 12-14).

order to be spared certain penalties.'" *Commonwealth v. Bowen*, 63 Mass. App. Ct. 579, 584 (2005) (quoting *Commonwealth v. Damiano*, 14 Mass. App. Ct. 615, 619 (1982). Indeed, the defendant fails to even so much as allege that he felt compelled to plea based on his perception of the strength of the case against him (R.A. 12-14). Nonetheless, if the defendant was motivated in part to plea based on his perception of the Commonwealth's case against him, that fact does not render his otherwise voluntary plea to be involuntary. *See Berrios*, 447 Mass. at 708-09 ("the concern of possibly receiving a harsher sentence if a defendant is tried and found guilty, and pressure from family members and from counsel, do not necessarily render pleas involuntary"); *Quinones*, 414 Mass. at 436 (whatever pressure or discouragement the defendant may have felt because of the denial of his motion for the appointment of new counsel, it may not be the basis of a finding of an absence of voluntariness); *Morrow*, 363 Mass. at 606-07 (guilty plea not invalid whenever motivated by the defendant's desire to accept the certainty of a lesser penalty due to a plea bargain

rather than face a wider range of possibilities as a result of trial).

Moreover, in considering the voluntary nature of the defendant's plea, it is significant that, in contemplation of the plea agreement, the defendant received the benefit of an exceptionally lenient disposition (R.A. 3). Despite facing the possibility of a substantial committed sentence (conceivably as great as year in the house of correction), his sentence was limited to no more than a one year continuance without a finding to run concurrent with a sentence he was serving out of the Brockton District Court, a fraction of his total possible exposure (R.A. 3). *See Furr*, 454 Mass. at 112 ("the highly generous sentence recommendation that the defendant received in light of the offenses with which he was charged strongly supports the conclusion that the defendant chose voluntarily to plead to those offenses"); *Commonwealth v. DeCologero*, 49 Mass. App. Ct. 93, 94 (2000) ("voluntariness may be inferred from the extensive discussions at the plea hearing regarding the favorable sentencing consequences which the defendant would receive"). Given the generous

disposition that he received, it is difficult to discern how his decision to agree to the plea was not made voluntarily.

The defendant need not have a full understanding of the trial evidence and any possible attacks on the credibility of the witnesses against him for a plea to be intelligent and voluntary. *See Brady*, 397 U.S. at 757 (a "defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case"); *see also Commonwealth v. Russin*, 420 Mass. 309, 317-18 (1995) ("'[i]n establishing that a guilty plea is offered intelligently and voluntarily by the defendant, the judge must ensure that the plea has been made with an understanding of the nature of the charge and the consequences of the plea'") (quoting *Morrow*, 363 Mass. at 605). Even if such an understanding was required, the defendant's meager submission once again fails to rise to the level where this court could even infer the defendant had such a misunderstanding (R.A. 12-14).

To be sure, the defendant's failure to understand the strength of the case against him could have significance if it resulted from ineffective assistance of counsel -- a claim the defendant has not raised. *See Commonwealth v. Walker*, 443 Mass. 867, 871, *cert. denied*, 546 U.S. 1021 (2005); *Commonwealth v. Ortiz-Peguero*, 51 Mass. App. Ct. 90, 95-8 (2001). In the absence of ineffective assistance of his own counsel, however, a defendant's ignorance of a possible challenge to the credibility of a government witness is not relevant. *See Berrios*, 447 Mass. at 706, 710 (credibility problems on the part of government witnesses "relate to the weight of the evidence and are properly left to the fact finder for resolution"); *see also id.* at 710 (the Court did not see "how this potential problem for the Commonwealth has any bearing on the voluntariness of the defendant's pleas"). Hence, possible attacks on the witness' credibility have no bearing on the validity of the defendant's guilty plea. Even if the court considered the merits of the "newly discovered evidence" it would still not avail the defendant. Even *in* the context of a post-conviction attack

following a trial, in which the defendant did indeed contest his guilt, newly discovered evidence that tends merely to impeach testimony of witnesses does not ordinarily warrant a new trial. *See Commonwealth v. Simmons*, 417 Mass. 60 (1994) (newly discovered impeachment evidence that cooperating co-defendant earlier stated defendant was not with him at time of murder insufficient to warrant a new trial).

Moreover, any reliance the defendant may place on *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006), is similarly unavailing. *Ferrara* stands for the proposition that to set aside a plea as involuntary in circumstances like the ones alleged here, the defendant must "[f]irst show that some egregiously impermissible conduct . . . antedated the entry of his plea . . . [and] [s]econd, he must show that the

misconduct influenced his decision to plead guilty[4] or, put another way, that it was material to that choice." *Id.* at 290. The facts at work in *Ferrara*, juxtaposed against those in the instant case reveal the fundamental defect in the defendant's claim. In *Ferrara* the prosecutor "manipulated the [primary government] witness into reverting back to his original version of events, then effectively represented to the court and the defense that the witness was going to confirm the story (now known by the prosecution to be a manipulated tale) that the petitioner was responsible for killing [the victim]." *Id.* at 291. Thus, there was egregious misconduct in

[4] Relative to the second prong in *Ferrara* the court found no defect in the defendant's failure to submit an affidavit alleging that the misrepresentation was material. *Ferrara*, 456 F.3d 295. However, 28 U.S.C. § 2255 permits a petitioner to forgo an affidavit and sign the petition under the pains of penalties of perjury, and even the failure to do so is not fatal to the defendant's claim. *See e.g., Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990). Mass. R. Crim. P. 30(b) has no analogous provision which permits the court to dispense with the requirement that the defendant at least aver in his affidavit that, but for the misconduct, the defendant would not have pled guilty. The defendant here has failed to even so much as allege that any misconduct which may have occurred would have been material to his choice to plea (R.A. 13-16). *See Ferrara*, 456 F.3d 290 (defendant must show misconduct influenced decision to plead guilty).

the defendant's case. Indeed, as has been the Commonwealth's position since the allegations of misconduct at the Hinton Laboratory came to its attention, where there is a showing that there was egregious misconduct *in the defendant's case* the conviction should be vacated.[5] However, here there has been no showing of misconduct. Rather, there is a showing that one of the individuals who participated in the analysis is believed to have engaged in some unspecified misconduct in *some cases* (R.A. 15).

The logic the defendant seeks to apply would, in the context of the misconduct in *Ferrara*, require the federal courts, at a minimum, to vacate every other conviction of every other defendant in the history of the United States Attorney's Office where the prosecutor in *Ferrara* was part of the prosecution team -- a result which even the defendant would no

[5] As part of the Attorney General's investigation into the allegations of misconduct at the Hinton Laboratory, a review of laboratory documentation between January 2010 and June 2011 revealed only three Suffolk County cases where the outcomes of testing were manipulated. *See Commonwealth v. Miguel Vasquez* 1006CR002969; *Commonwealth v. Paul Flannelly* 1001CR006852; *Commonwealth v. Stephen Goudreau* 1003CR001344. Following that discovery, the Commonwealth immediately moved to vacate these convictions and entered nolle prosequis.

doubt concede is absurd. In short, without a showing of egregious misconduct *in the defendant's case* the defendant's conviction must stand.

Importantly, the claim that misconduct by a government agent or witness in an unrelated case gives rise to a motion for new trial has already been rejected by both the Appeals Court and the Supreme Judicial Court. In *Commonwealth v. Campiti*, 41 Mass. App. Ct. 43 (1996), one of the State Police Troopers involved in the defendant's case was later convicted of embezzling money seized in narcotics cases. *Id.* at 65. The court concluded that it was appropriate to reject Campiti's claims where he had demonstrated "only that [the Trooper] acted in a separate, distinct and unconnected way [by] committing an unlawful act that had no connection with his law enforcement activities." *Id.* More recently, in *Commonwealth v. Ellis*, 432 Mass. 746 (2000), the Supreme Judicial Court rejected the defendant's claim that the subsequent federal indictment and conviction of the investigating officers for submitting false search warrant affidavits in order to effect the illegal seizure of property and funds casted "doubt on the

integrity of the police investigatory procedures" where the defendant failed to make a showing that the "detectives procured false evidence in connection with the investigation of this defendant." *Id.* at 764-65; *See also Commonwealth v. Waters*, 410 Mass. 224 (1991) (defendant failed to establish that testimony of officer, later convicted of perjury, was false). The thread which inextricably links *Ferrara*, *Campiti*, and *Ellis* is the requirement that the defendant make a showing of misconduct in his case -- a burden which the defendant in the instant case has failed to sustain.

Notably, the defendant failed to submit his own affidavit that even so much as alleges that his plea was not knowing, intelligent and voluntary, and that he would not have pled guilty had he been aware of the alleged misconduct at the Hinton Laboratory (R.A. 12-14). Here this court may draw, by analogy, from the case law relative to claims of ineffective assistance of counsel. In the context of a guilty plea, in order to satisfy the "prejudice" requirement, the defendant must establish that "there is a reasonable probability that, but for counsel's errors,

he would not have pleaded guilty and would have insisted on going to trial." *See Commonwealth v. Clarke*, 460 Mass. 30, 47 (2011) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). "At a minimum, this means that the defendant must aver that to be the case." *Id.* (citing *Hill*, 474 U.S. at 60). "In addition, he must 'convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Id.* (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)). This court is entitled to consider this omission when reviewing the adequacy of the defendant's showing. *See Commonwealth v. Goodreau*, 442 Mass. 341, 354 (2004) (citation omitted) ("When weighing the adequacy of the materials submitted in support of a motion for a new trial, the judge may take into account the suspicious failure to provide pertinent information from an expected and available source."). In the absence of even so much as a self-serving averment to the contrary, all this court has left to consider is the defendant's solemn admission of his guilt, under oath and after a full colloquy (R.A. 3), and his written waiver of rights (R.A. 10-11). The defendant's scant

showing, amounts to nothing more than unsworn and unsupported statements in the body of the motion (R.A. 12-13) and a hearsay riddled affidavit of counsel which alleges nothing more than the existence of an investigation into alleged misconduct at the Hinton Laboratory (R.A. 14). Such a showing cannot be said to raise a substantial issue, and it was error for the motion judge to rule otherwise.

II. IT WAS ERROR FOR THE MOTION JUDGE TO ALLOW THE DEFENDANT'S MOTION WHERE THE DEFENDANT WAIVED HIS CLAIM THAT THE COMMONWEALTH FAILED TO PROVIDE "TRUE AND ACCURATE" DISCOVERY IN VIOLATION OF *BRADY V. MARYLAND* WHEN HE TENDERED HIS PLEA OF GUILTY; THE DEFENDANT MADE NO SHOWING THAT THE COMMONWEALTH FAILED TO PROVIDE "TRUE AND ACCURATE" DISCOVERY; THE COMMONWEALTH IS UNDER NO OBLIGATION TO PROVIDE IMPEACHMENT EVIDENCE PRIOR TO A DEFENDANT'S CHANGE OF PLEA; AND, IN ANY EVENT, THE COMMONWEALTH DID NOT SUPPRESS EXCULPATORY EVIDENCE.

The defendant lastly claimed, without citation to authority or the record that "the misconduct of Annie Dookhan and/or other employees of the Hinton State Laboratory, which is imputed to the Commonwealth . . . deprived [the defendant of] due process by . . . [the] fail[ure] . . . to provide true and accurate discovery prior to his admission to sufficient facts, in violation of the Fifth**Error! Bookmark not defined.**

and Fourteenth Amendments and Article 12[.] Br*ady v. Maryland*, 373 U.S. 83 (1963) (R.A. 13). As the Commonwealth did not suppress exculpatory evidence, and as the defendant waived his right to receive exculpatory evidence by his tender of plea, the defendant's meritless claim must fail.

A. The Defendant Waived His Claim That The Commonwealth Did Not Provide "True And Accurate" Discovery When He Tendered His Plea Of Guilty; And, In Any Event, The Defendant Failed To Make A Showing That He Was Not Provided With "True And Accurate Discovery".

The defendant's claim misapprehends the state of the law relative to motions to vacate guilty pleas. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). In short, "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id; see also Brady*, 397 U.S. 742 (plea, encouraged by fear of possible death sentence which was later ruled unconstitutional, was

voluntary, knowing and intelligent); *McMann v. Richardson*, 397 U.S. 759 (1970) (plea based upon competent advice of counsel was an intelligent plea not open to collateral attack on the basis that counsel may have misjudged the admissibility of confession); *Parker v. North Carolina*, 397 U.S. 790 (plea tendered to avoid unconstitutional imposition of death penalty, and involuntary confession nonetheless intelligent and knowing).

Here, the defendant's plea of "guilty by its terms waive[]d all non-jurisdictional defects." *Commonwealth v. Cabrera*, 449 Mass. 825, 830 (2007), citing *Garvin v. Commonwealth*, 351 Mass. 661, 663-64, appeal dismissed, *cert. denied*, 389 U.S. 13, (1967) (even illegally obtained confession cannot be basis for collateral attack on conviction based on voluntary and intelligent guilty plea); *see also United States v. Stevens*, 487 F.3d 232, 238-40 (5th Cir.), *cert. denied*, 552 U.S. 936 (2007) (where defendant entered unconditional guilty plea, court would not revisit suppression issues); *United States v. Doyle*, 348 F.2d 715, 718 (2d Cir.), *cert. denied*, 382 U.S. 843

(1965) (guilty plea waives claim of speedy trial violation).

Importantly, the defendant has failed to make a showing or even an unsupported allegation that the Commonwealth did, in fact, fail to provide true and accurate discovery (R.A. 13-16). The absence here is notable as the entirety of the defendant's claim rests upon the *a priori* presumption that the Commonwealth failed to provide "true and accurate" discovery. Accordingly, the defendant's claim is without any factual basis at all.

Assuming *arguendo*, that the Commonwealth failed to provide discovery which it neither had nor could have obtained; or that the Commonwealth's provision, pre-trial, of an analysis performed, in part, by Annie Dookhan who, unbeknownst to the Commonwealth, would later be the subject of allegations of misconduct, could be a violation of the defendant's due process rights under *Brady*, the defendant's intervening plea renders alleged *Brady* violations moot. The defendant's claim must necessarily fail.

B. The Commonwealth Is Under No Obligation To Disclose Impeachment Evidence Prior To A Defendant's Change Of Plea.

Regardless of whether or not the defendant waived his claim by tendering a plea of guilty, the Commonwealth was under no obligation to disclose impeachment evidence, especially that of which it had no knowledge, prior to the defendant's change of plea. Although it is undisputed that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution", *Brady*, 373 U.S. at 87, the government is under no obligation to disclose material impeachment evidence prior to entering into a plea agreement. *United States v. Ruiz*, 536 U.S. 622, 629 (2002). "Impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*." *Id.* (emphasis in original). The Constitution does not place upon the government the obligation to share all useful information with the defendant. *Weatherford v. Bursey*, 429 U.S. 545, 559

(1977). The Court in *Ruiz*, relying on the *Brady* trilogy and its progeny found that

> . . . the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. *See Brady v. United States*, 397 U.S. at 757 (defendant "misapprehended the quality of the State's case"); *id.* (defendant misapprehended "the likely penalties"); *id.* (defendant failed to "anticipate a change in the law regarding" relevant punishments"); *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970) (counsel "misjudged the admissibility" of a "confession"); *United States* v. *Broce*, 488 U.S. 563, 573 (1989) (counsel failed to point out a potential defense); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973) (counsel failed to find a potential constitutional infirmity in grand jury proceedings). It is difficult to distinguish, in terms of importance, (1) a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue in these cases.

Id. at 630. The evidenced described by the defendant falls squarely within the bounds of impeachment evidence and the Commonwealth was therefore under no obligation to disclose it prior to the defendant's change of plea, particularly where it was not known to the Commonwealth.

Black's Law Dictionary defines impeachment as "[e]vidence used to undermine a witness's credibility. Fed. R. Evid. §§ 607-10." *Black's Law Dictionary*, 8th ed., 597. The analog to the Federal Rules can be found in the Massachusetts Guide to Evidence §§ 607-10. A party seeking to offer impeachment evidence may do so by contradicting the witness' testimony, challenging the witness' testimonial faculties, demonstrating the witness' bias, prejudice, or motive to lie, and showing that the witness has a bad character for truthfulness and veracity. *Handbook of Massachusetts Evidence*, 7th ed., Liacos & Brodin, 269. The newly discovered evidence described in general and vague terms by the defendant, if admissible at all, would be used solely to test "the purity of principle, [and] the skill, accuracy, and judgment of the witness." *Hathaway v. Crocker*, 48 Mass. 262, 266 (1843).

Accordingly, where the evidence at issue here is impeachment evidence, and the Commonwealth is under no obligation to provide it prior to the defendant's change of plea, the Commonwealth did not fail to

satisfy its discovery obligations and the defendant's claim must fail.

C. The Commonwealth Did Not Suppress Exculpatory Evidence.

Lastly, there is no merit to the defendant's contention that the Commonwealth improperly suppressed exculpatory evidence. In *Brady* the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Since then, the Court has expanded the holding of Brady to create a duty to disclose exculpatory evidence, including impeachment evidence, even though there has been no request by the defendant. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *United States v. Agurs*, 427 U.S. 97, 107 (1976).

"A prosecutor's duty [to disclose exculpatory evidence] extends only to exculpatory evidence in the prosecutor's possession or in the possession of the police who participated in the investigation and

presentation of the case." *Commonwealth v. Tucceri*, 412 Mass 401, 407 (1992). Members of the prosecution team to whom the duty extends includes "members of [the prosecutor's] staff and . . . any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to [the prosecutor's] office." *Commonwealth v. Daye*, 411 Mass. 719, 734 (1992). However, a "prosecutor cannot be said to suppress that which is not in his possession or subject to his control," *Commonwealth* v. *Donahue*, 396 Mass. 590, 596 (1986), and thus "[o]rdinarily the prosecutor's obligation to disclose information is limited to that in the possession of the prosecutor or police." *Commonwealth* v. *Liebman*, 379 Mass. 671, 675 (1980).

In this case, at the time of the defendant's plea, the impeachment information, which was not revealed until after the defendant's plea, was contained within the mind of Ms. Dookhan and could not have been subject to compelled production by the government. *See Miranda v. Arizona*, 384 U.S. 436

(2013). Furthermore, in *Waters*, 410 Mass. 224, a case in which the officers were alleged to have perjured themselves in an effort to conceal an extortion scheme, the Supreme Judicial Court refused "to attribute to the prosecution the conduct of police officers in pursuit of their own individual unlawful scheme unrelated to the Commonwealth's interest in law enforcement." *Id.* at 230.

Accordingly, because the evidence was not in the care, custody, or control of the prosecutor or his prosecution team, the government's failure to disclose that which it did not know existed, nor could have reasonably discovered, cannot be a failure to comply with its obligations under both *Brady* and Mass. R. Crim. P. 14(a)(1)(A)(iii) and the defendant's claim must fail.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court set aside the lower court's order allowing the defendant's motion to vacate his plea and enter a new order denying the defendant's motion to vacate his plea.

Respectfully submitted
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APRIL 2013