COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
SJC-11709.

HAMPDEN COUNTY.

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

BRYANT WARE,
Appellant.

Brief of Appellant, Bryant Ware.

Respectfully submitted
for Bryant Ware,

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July 18, 2014

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Issue Presented

I. Where a defendant establishes a *prima facia* case that the integrity of the Commonwealth's evidence has been impaired by the felonious malfeasance of a drug-lab chemist to whom the Commonwealth entrusted its evidence (and then failed to adequately supervise), and - in the face of the Commonwealth's choice to fail to investigate the scope of that chemist's criminal misconduct - where, on that basis, that defendant seeks to determine the extent to which the evidence that led to his convictions was compromised, did the Superior Court abuse its discretion by denying the defendant's motion for post-conviction discovery on the grounds that he did not already have evidence that the chemist had impaired the integrity of the evidence in his case and that the impairment of the Commonwealth evidence could not have been material to the plea agreement concluded by the Commonwealth and the defendant?

Statement of the Case[1]

Three sets of charges were returned against Mr. Ware by Hampden County Grand Juries regarding offenses based in Springfield, Massachusetts. R.A. 1-19.

On August 29, 2007, Mr. Ware was charged (under docket number HDCR2007-01072) with unlawful possession of cocaine with intent to distribute; unlawful possession of a class D substance; a drug violation in a school zone; unlawful possession of a firearm without and FID card; and, conspiracy to violate the drug laws. R.A. 4, 7.

On May 21, 2008, Mr. Ware pled guilty to unlawful possession of cocaine with intent to distribute; unlawful possession of a class D substance; and, unlawful possession of a firearm without and FID card. R.A. 5. With respect to the possession of cocaine with intent to distribute charge, he was sentenced to two-and-one-half years in the house of correction, with one year to serve and the balance suspended for two years. R.A. 5. A six month sentence to the house of correction was imposed relative to the two

[1] The Record Appendix will be cited as "R.A. [page]."

remaining convictions, with that sentence to run concurrently with the other conviction. R.A. 5.

On November 25, 2009, Mr. Ware was charged (under docket number HDCR2009-01072) with unlawful distribution of cocaine, subsequent offense. R.A. 11, 13.

On March 9, 2010, Mr. Ware was charged (under docket number HDCR2010-00253) with unlawful possession of a class A substance with intent to distribute, subsequent offense; a drug violation in a school zone; five counts of assault and battery by means of a dangerous weapon; and, resisting arrest. R.A. 16, 18.

Pursuant to a plea agreement, on February 4, 2011, Mr. Ware entered pleas of guilty concerning the unlawful possession of a class A substance with intent to distribute, subsequent offense and six other charges under HDCR2010-00253; concerning the charge of with unlawful distribution of cocaine, subsequent offense under HDCR2009-01072; and, as to a probation violation concerning HDCR2009-01072. R.A 7, 12-13, 18. Concurrent sentences of not less than 5 years nor more than 7 years incarceration were imposed regarding both the charge under HDCR2009-01072 and the drug-related offense charged in HDCR2010-00253 (the other

offenses charged under the latter docket number resulted in a sentence of 18 months probation to be served after that incarceration). R.A. 12-13, 18. Still pursuant to the plea agreement, a sentence of 18 months to the House of Correction was imposed relative to a probation violation under HDCR2007-01072. R.A. 6.

On August 12, 2013, Mr. Ware filed a motion for a new trial under HDCR2009-01072. R.A. 13.

On February 14, 2014, Mr. Ware filed a motion for leave to conduct post-conviction discovery, and for funds, that referenced all three cases that had been the subject of the February 4, 2011, plea agreement. R.A. 20.

Following a March 10, 2014, hearing in Northampton, on March 12, 2014, the Superior Court (Kinder, J.) denied that motion. R.A 307-08. Mr. Ware filed a notice of appeal on March 18, 2014. R.A. 309.

Statement of Facts

This case does not directly concern the malfeasance of Ms. Annie Dookhan, but rather the criminal misconduct of a *second* felonious chemist, Sonja Farak.

After working with Annie Dookhan at the Hinton laboratory for most of 2004, Ms. Farak moved to the Commonwealth's drug lab in Amherst, where she was entrusted with evidentiary samples, including those from the City of Springfield. R.A. 83, 88, 265, 274.

At some point - either before or after her move to the Amherst laboratory, Ms. Farak began to remove cocaine from the samples she had been entrusted to test. *See, e.g.,* R.A. 91. She developed the practice of replacing that cocaine with soap-like substances (hereinafter "soap"). *See, e.g.,* R.A. 91.

On January 18, 2013, fellow employees at the Amherst laboratory stumbled upon Ms. Farak's misconduct. *See, e.g.,* R.A. 83-84. The State Police were contacted, and an investigation began. *See, e.g.,* R.A. 84.

With respect to the discovery of malfeasance that led to charges against Ms. Farak, the Commonwealth stopped the criminal investigation after four days.

Specifically, within four days after discovering that Ms. Farak had impaired the integrity of its evidence, the Commonwealth brought charges in District Court as to the four cases in which her tampering had

immediately become evident. R.A. 47-51. On April 1, 2013, Ms. Farak was indicted, but only as to those same four cases. R.A 53-62; 66, 74. Pursuant to a plea agreement concluded with the Commonwealth, on January 6, 2014, Ms. Farak entered guilty pleas relative to those indictments - concerning the same four instances of misconduct. R.A. 68, 75. Consistent with the plea agreement, Ms. Farak was sentenced to a house of correction. R.A. 68-69, 75-76.

Thus, pursuant to a plea agreement with the Commonwealth, in January, 2014, Ms. Farak admitted to - and only to - the misconduct that had been immediately evident within the first four days after the Commonwealth discovered that she had been tampering with evidence.

No comprehensive re-testing or re-examination of the evidence that had been entrusted to Ms. Farak has been undertaken by the Commonwealth. The extent to which her misconduct resulted in impairment of the Commonwealth's evidence, not uncoincidentally, remains unknown.

During hearings that concerned motions brought by various defendants (not including Mr. Ware), evidence of a series of additional instances in which Ms. Farak had tampered with evidence were produced. *See, e.g.*, R.A. 80, 87-89. As to those additional instances, the Commonwealth had randomly happened upon evidence of Ms. Farak's tampering, and had provided some information in that regard to the defense.

As the Superior Court would repeatedly find, in each of those additional cases, the evidence established that Ms. Farak had engaged in felonious conduct, including particularly tampering with - and theft of - evidence. R.A. 91, 172, 191, 210, 228, 252. The Commonwealth has chosen not to bring charges in any of those matters.

Three of the randomly-discovered instances in which Ms. Farak impaired the integrity of the Commonwealth's evidence occurred in July, 2012. *See, e.g.*, R.A 87-88. By that point, Ms. Farak had developed her practice of removing cocaine from the evidentiary samples with which she had been entrusted, and replacing it with soap. R.A. 91, 172, 191, 210, 228, 252.

Mr. Ware's motion, *below*, was focused on discovering when Ms. Farak began to compromise the Commonwealth's evidence. R.A. 20-21. In that regard, in January, 2013, Ms. Farak's vehicle was found to contain a newspaper article printed on September 20, 2011. R.A. 86. On that article, which related a story about law enforcement officers who illegally possessed steroids, was a handwritten note stating "thank god I am not a law enforcement officer." R.A. 86.

Further in that regard, Ms. Farak's vehicle contained a second article, from October, 2011, that concerned a Pittsfield pharmacist who had been sentenced to 3 years imprisonment for stealing oxycontin pills from her workplace. R.A. 86. That article mentioned that the pharmacist had replaced the stolen drugs with other substances. R.A. 86.

Even further in that regard, also found in Ms. Farak's vehicle was an article that had been downloaded and printed in December, 2011, that referred to a San Francisco Police Department drug lab technician who stole cocaine from the drug laboratory. R.A. 86.

Summary of the Argument

Mr. Ware made a *prima facia* showing that the evidence sought by means of his motion for post-conviction discovery was reasonably likely to uncover evidence that might warrant granting a new trial. Mr. Ware sought re-testing and examination of evidentiary samples so as to determine whether the criminal misconduct of a felonious drug-lab chemist had compromised the Commonwealth's evidence to such an extent that his convictions should be vacated.

In ruling on similar motions by other defendants regarding the criminal malfeasance of that chemist, the Superior Court had found dispositive the proximity of such defendants cases to the time evidence established the chemist's misconduct was ongoing. Specifically, the Superior Court made findings of fact that, as of July, 2012, that chemist had stolen cocaine from the samples she had been entrusted to test, and had replaced it with soap. The Superior Court denied motions where defendants' cases had gone forward before July, 2012, and allowed a motion where the case had gone forward after that time. (pp. 11-18).

The Commonwealth suffered from a genuine conflict of interest in that regard, with the vigor of its investigation of the felonious chemist posing a threat to its interest in preserving convictions, such as those of Mr. Ware. In that regard, the Commonwealth stopped its criminal investigation of the felonious chemist within four days, and only prosecuted her for the malfeasance which had been immediately evident. (pp. 18-20).

Given the critical nature of evidence as to when the chemist's malfeasance had taken place, together with the Commonwealth's choice to fail to investigate the chemist, Mr. Ware sought retesting of samples that had been entrusted to that chemist. Both as a result of its application of the wrong standard and circular reasoning (in which Mr. Ware was faulted for not having the evidence he was seeking), the Superior Court denied his motion for post-conviction discovery. That denial constituted an abuse of discretion, and should be reversed. (pp. 21-28).

Argument

I. Since Mr. Ware made a sufficient showing that the evidence he sought by means of a motion for post-conviction discovery was reasonably likely to uncover evidence that might warrant granting a new trial, the Superior Court committed an abuse of discretion in denying that motion.

The Prima Facie Case.

"'In requesting post-conviction discovery, a defendant must make a sufficient showing that the discovery is reasonably likely to uncover evidence that might warrant granting a new trial.'" *Commonwealth v. Morgan*, 453 Mass. 54, 61-62 (2009). As defined herein, Mr. Ware made such a sufficient showing, and the Superior Court's denial of his motion for post-conviction discovery comprised an abuse of discretion. *See Commonwealth v. Martinez*, 437 Mass. 84, 97-98 (2002) (post-conviction discovery is a matter for the court's discretion, and depends on whether a sufficient showing has been made).

Throughout its analyses in related cases of Ms. Farak's misconduct, the Superior Court repeatedly - and correctly - held that such felonious chemist had engaged in malfeasance of sufficient gravity to satisfy the tests set forth in *Ferrara v. United*

States, 456 F. 3d 278, 290 (1st Cir. 2006). R.A. 89-90, 171-72, 190-91, 209-10, 227-28, 251-52.

The Superior Court's repeatedly stated its entirely-sound conclusion relative to the foregoing:

> From these facts and all of the physical evidence seized in connection with the criminal investigation of Farak, I conclude that she removed controlled substances from samples that she was charged with testing and replaced them with other substances to conceal her thefts. This is the kind of egregiously impermissible conduct contemplated by Ferrara.

R.A. 91, 172, 191, 210, 228, 252.

The Superior Court's conclusion was well-founded: examining the corresponding malfeasance of Ms. Dookhan, the Supreme Judicial Court would hold the malfeasance of that other felonious chemist was the sort of egregious misconduct contemplated in *Ferrara:*

> In sum, we conclude that Dookhan's misconduct is the sort of egregious misconduct that could render a defendant's guilty plea involuntary, and we further conclude that Dookhan's actions may be attributed to the government for the purposes of the *Ferrara* analysis. . . . Thus, defendants seeking to vacate a guilty plea who produce a drug certificate related to the charges underlying their plea that is signed by Dookhan on the line labeled "Assistant Analyst" are entitled to a conclusive presumption that all three elements of the showing required under the first prong of the *Ferrara* analysis have been satisfied.

Commonwealth v. Scott, 467 Mass. 336, 354 (2014).

From there, the only material distinction between the cases in which the Superior Court denied motions for a new trial grounded on Ms. Farak's impairment of the integrity of the Commonwealth's evidence and the case in which that court allowed such a motion was evidence as to the timing of the criminal misconduct.

Specifically, in the *Cotto*, *Watt*, *Deon Charles*, *Garcia* and *Harris* cases, the Superior Court denied the motions for a new trial because of lack of evidence that Ms. Farak had compromised evidence at times proximate to the critical events in those cases. R.A. 91-92, 172, 191, 210, 228-29. *See, e.g.*, "[Ms. Farak's] misconduct postdates Harris's guilty plea by almost one year. I therefore conclude that Harris has failed to establish that Farak's misconduct antedated his guilty plea." R.A. 228-29.

In contrast, the Superior Court allowed the motion for a new trial in the *Guzman* case where the evidence established that Ms. Farak's malfeasance was ongoing at the time of Mr. Guzman's guilty plea:

> Further, I infer from the evidence uncovered by retesting of other samples that she was doing so in the summer of 2012, well before Guzman pled guilty. I therefore conclude that Guzman has established that Farak's misconduct antedated his guilty plea.

R.A. 252.

Therefore, the decisive factor in the *Cotto*, *Watt*, *Deon Charles*, *Garcia*, *Harris* and *Guzman* cases - the factor that determined whether their motion for a new trial would be allowed or would be denied - concerned whether the moving party happened to have evidence that Ms. Farak's criminal malfeasance was ongoing during the pendency of their case. As such, in those cases, the Superior Court illustrated, vividly, the critical importance of evidence as to when Ms. Farak compromised the Commonwealth's evidence.

The testing sought by Mr. Ware would determine precisely that decisive element. *Compare Commonwealth v. Daniels*, 445 Mass. 392, 407-10 (2005) (*reversing* the denial of post-conviction discovery where the subject of such discovery "was the peg on which the defendant's conviction hung or fell").

The record, to the Commonwealth's discredit, most unfortunately consists in substantial part of randomly bestowed scraps. Nevertheless, even that record establishes that, in every likelihood, Ms. Farak's felonious malfeasance extended to times well before July, 2012.

In particular, the record includes judicial findings of fact that, in July, 2012, Ms. Farak had stolen cocaine from three evidentiary samples. R.A. 91, 172, 191, 210, 228, 252. Given the Commonwealth's inexcusable failure to conduct comprehensive retesting, the fact that three instances of such tampering in July 2012 were happened upon establishes that it is reasonably likely that Ms. Farak did not then begin her tampering.

In that regard, the odds would be astronomical that the Commonwealth, without comprehensive re-testing, randomly happened upon the first three occasions in which Ms. Farak stole cocaine from the evidence with which she had been entrusted. Consequently, common sense would suggest, forcefully, that it is reasonably likely the Ms. Farak's felonious malfeasance pre-dated July, 2012.

Moreover, while the record contains absolutely no indication that Ms. Farak began her criminal activity in July, 2012, it does contain testimony by her hapless supervisor at the Amherst laboratory that she could have been tampering with evidence for years

before she was arrested (that arrest was in January 2013).[2] R.A. 234.

Furthermore, the materials found in Ms. Farak's car in January, 2013, included three articles from 2011 that were consistent with her undertaking her felonious misconduct in that year. R.A. 86. Two such articles described the precise sort of misconduct for which Ms. Farak would be convicted, with one concerning a pharmacist who stole oxycontin pills from her workplace and the other concerning a drug lab technician who stole cocaine from the drug laboratory. R.A 86.

As to the third article found in Ms. Farak's car, about law enforcement officers who illegally possessed controlled substances, someone, inferably Ms. Farak, wrote "thank god I am not a law enforcement officer." R.A. 86. It would defy credulity to suggest that, in 2011, she wrote that on such an article - but did not

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[2] During the Superior Court evidentiary hearing in this court, that supervisor testified as follows:

> Q. You would agree wouldn't you, Mr. Hanchett, that Sonja Farak could have been tampering with evidence for years before she was arrested?
>
> A. Yes, that's correct.

R.A. 234.

begin her criminal misconduct until July 2012. R.A. 86. Similarly, and while all three articles were from the second-half of 2011, it would be unlikely that Ms. Farak collected articles about that sort of misconduct during 2011, but wait until July, 2012, to begin her own malfeasance.

Finally, there is the remarkable fact that, in 2004, Ms. Farak out-produced her co-worker at the Hinton Lab - Annie Dookhan - by a wide margin. R.A. 265, 274. Notably, between 2004 and 2011, Ms. Dookhan "was consistently assigned (and presumably tested) more samples at the drug lab than any other chemist, exceeding her peers by as much as 50% more than the second highest chemist." R.A. 281. Ms. Dookhan's productivity was the product of malfeasance, the result of her fraudulently reporting results without having conducted the tests. *Scott*, 467 Mass. at 339.

Nevertheless, in the seven months they worked together in 2004 at the Hinton laboratory, Ms. Dookhan reported 4,427 results, and Ms. Farak reported 5,847 results. R.A. 265, 274.

In that circumstance, the fact that Ms. Farak's reported results far exceeded the apparently-fraudulently inflated numbers of Ms. Dookhan is consistent both with Ms. Farak's misconduct having extended to times far earlier than 2011 and with the Commonwealth's conflict-ridden decision to forgo investigation.

The Commonwealth's Conflict.

This matter presents the concerning circumstance in which Mr. Ware has been compelled to resort to the motion brought, *below*, because of the Commonwealth's choice to fail to itself determine the extent to which its own evidence has been compromised. Given the Commonwealth's imprudent decision, there is no other, evident way Mr. Ware could learn whether the Commonwealth's evidence has been impaired.

The Commonwealth, of course, had, and has, the discretion to chose to fail to prosecute Ms. Farak for her tampering with the evidence in the *Stafford* and the *Sands* and the *Richard Charles* and the *Morton* cases. *See, e.g.*, R.A. 87-89. In each of those cases, Ms. Farak tampered with the evidence, stealing cocaine and replacing it with soap. R.A. 87-89. In none of those cases has the Commonwealth brought

charges. (As discussed above, the only matters that led to criminal charges against Ms. Farak were those immediately apparent upon the discovery of her malfeasance - those that were apparent during the at-most four-day criminal investigation). Not to its credit, the Commonwealth has exercised such discretion.

The Commonwealth's decisions to fail to investigate the extent of Ms. Farak's felonious malfeasance and to oppose Mr. Ware's effort to do so have taken place in a context in which the Commonwealth is beset by a genuine conflict of interest. Pursuant to that conflict, the more vigorous its investigation of the felonious chemist's malfeasance, the more difficulty the Commonwealth would have preserving convictions.

The Commonwealth was presented with precisely the same conflict in the Dookhan matter. R.A. 156-57. In response, Commonwealth wisely chose integrity over expediency, and investigated that felonious chemist's malfeasance fully. As a result, the Commonwealth stands to lose tens of thousands of convictions. *Scott*, 467 Mass. at 340.

Here, in proceedings beyond the Boston media glare, the Commonwealth made a choice consistent only with preserving convictions. *Compare* C.S. Lewis, "Integrity is doing the right thing, even when no one is watching."[3] By stopping the criminal investigation of Ms. Farak within four days of the discovery of her felonious malfeasance, and choosing to allow her criminal misconduct in (at least) the *Stafford* and the *Sands* and the *Richard Charles* and the *Morton* cases to go unprosecuted, the Commonwealth has purchased insurance against the loss of ten of thousands more convictions. The price paid, however, was integrity.

As a consequence of the Commonwealth's choice, justice has not prevailed over expediency. Where, as here, there exists a conflict, however, justice must prevail - whether one, or one hundred, or one thousand, or ten thousand convictions are at issue.

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[3] In the Dookhan matter, the Commonwealth sought the appointment of an independent investigator. R.A. 156. While the same circumstances were present here, no such independent investigation was sought.

The Superior Court's Abuse of Discretion.

Presented in the void left by the Commonwealth's unmitigated conflict, Mr. Ware's motion, *below*, did not seek to establish whether the particular samples attributed to him and held by the Springfield Police Department have themselves been compromised. Rather, his position was, and is, consistent with the rationale set forth in such cases as *Commonwealth v. Scott*, 467 Mass. 336, 362 (2014). Specifically, Mr. Ware's argument tracks the Supreme Judicial Court's reasoning that the impairment of the integrity of the Commonwealth's evidence by another felonious chemist, Annie Dookhan, properly should be deemed to have created conclusive presumptions of malfeasance relative to individual cases. *Scott*, 467 Mass. at 362.

Hence, as in the cases of defendants relative to whom evidence was entrusted to Ms. Dookhan, Mr. Ware motion for new trial should be deemed to benefit from a conclusive presumption of malfeasance on the part of Ms. Farak - regardless of whether a present analysis of the particular samples in his cases would indicate that Ms. Farak compromised them individually. *Scott*, 467 Mass. at 362.

Therefore, the Superior Court's first ground for denying the motion for post-conviction discovery was wholly meritless. Such first ground consisted of the following:

> "First, there is no evidence that the test results in this case were inaccurate, or that Farak was involved in any misconduct at the time Ware pled guilty."

R.A. 308.

Since whether or not there was evidence that the individual test results in Mr. Ware's cases had been accurate was immaterial to the motion in question, the Superior Court's reliance on that ground constituted an abuse of discretion.

In addition, the motion before the Superior Court was brought as a result of the circumstance in which the Commonwealth had - and has - chosen to fail to investigate the extent to which Ms. Farak had compromised its evidence. In that context, Bryant Ware cannot properly be faulted for not having the results of the investigation that the Commonwealth chose not to conduct. *See Daniels*, 445 Mass. at 406-07 ("[i]ndeed, if a defendant were expected to present enough evidence through affidavits justifying the presumption that he was entitled to a new trial,

postconviction discovery would serve no purpose. The purpose of postconviction discovery is to allow a defendant to gather evidence to support 'an apparently meritorious claim . . . [where] the evidence that can be adduced to support the claim is unknown to the court'") (*citing* 4 ABA Standards for Criminal Justice, Postconviction Remedies Commentary to Standard 22-4.5, at 22-48 (2d ed. 1986)).

Furthermore, the foregoing conclusion is especially applicable in the context of Mr. Ware's motion, which, inherently, sought the kind of information the Superior Court faulted Mr. Ware for not having. Essentially, through an unfortunate, circular analysis, the Superior Court's denial of Mr. Ware's motion for discovery was grounded on the fact that he did not already possess the kind of information he was seeking.

In contrast to the Superior Court's ruling, and as previously discussed, the record does establish, not merely the likelihood, but also the probability that Ms. Farak had been undertaking her criminal malfeasance well before July, 2012. R.A. 86, 91, 172, 191, 210, 228, 234, 252, 265, 274.

The Superior Court's second ground for denying the motion, *below*, that being the conclusion that "there were good reasons to accept the plea agreement," missed the mark badly for several reasons. R.A. 308.

First, at issue was not whether Mr. Ware had made a sufficient showing to warrant the allowance of his motion for a new trial, but rather merely whether he had shown that the discovery he was seeking was "reasonably likely to uncover evidence that might warrant granting a new trial." *Commonwealth v. Werner*, 81 Mass. App. Ct. 689, 693 (2012) (underlining added) (*noting* that the trial court may "order appropriate discovery after the verdict if the defendant makes 'a sufficient showing that the discovery is reasonably likely to uncover evidence that might warrant granting a new trial'") (*quoting Daniels*, 445 Mass. at 407, and *citing* Mass.R.Crim.P. 30(c)(4)).

Under that much lesser standard, the question, essentially, became whether it was reasonably likely that the re-testing and examination of samples sought by Mr. Ware would uncover evidence that might warrant granting a motion for a new trial.

As indicated by the *Cotto*, *Watt*, *Deon Charles*, *Garcia*, *Harris* and *Guzman* cases, the answer to that question would depend simply on whether it was reasonably likely that such testing and examination of samples might indicate that Ms. Farak's malfeasance could be shown to have extended through 2011. *See, generally, Morgan*, 453 Mass. at 62 ("[t]o satisfy the standard for discovery under a motion for a new trial based on newly discovered evidence, 'a defendant must make specific, not speculative or conclusory, allegations that the newly discovered evidence would have 'materially aid[ed] the defense against the pending charges,' . . . and that this evidence if explored further through discovery, could yield evidence that might have 'played an important role in the jury's deliberations and conclusions, even though it is not certain that the evidence would have produced a verdict of not guilty''") (underlining added) (*quoting Daniels*, 445 Mass. at 407 *quoting Commonwealth v. Tucceri*, 412 Mass. 401, 405, 414 (1992)).

Given the probability that Ms. Farak's felonious malfeasance had been underway well before July, 2012, the Superior Court's implicit finding that it was not reasonably likely that such misconduct took place in 2011 constituted an abuse of discretion.

The Superior Court's second ground for denying the motion, *below*, (that being the conclusion that "there were good reasons to accept the plea agreement") also badly missed because, had Mr. Ware known that Ms. Farak had tampered with the Commonwealth's evidence against him, or of a conclusive presumption that the Commonwealth's evidence against him had been compromised, he undoubtedly would have concluded that a motion to suppress the tainted evidence would have been in order. *See Scott*, 467 Mass. 362.

In essence, given the nature of Ms. Farak's criminal misconduct, many samples - including those attributed to Mr. Ware - should be considered compromised. Hence, even the results of retesting would be subject to a motion to suppress.

The prospect that the Commonwealth, through its own fault, would not have evidence of the nature of the substances attributed to Mr. Ware could not but have been material to any decision by Mr. Ware to conclude a plea agreement. Essentially, should the Commonwealth's tainted evidence have been excluded from admission at trial - as could have been readily anticipated if Ms. Farak's malfeasance had then been known, that circumstance would be material to whether Mr. Ware would plea guilty to the charges that relied upon that evidence.

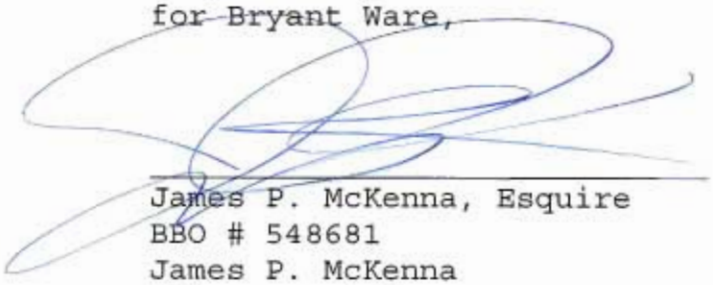
Thus, regardless of whether Mr. Ware had good reason to accept the plea agreement at the time he did so, the prospect that the Commonwealth could not prove its case because its evidence was inadmissible certainly would have been material to his decision in that regard. *See* Special Judicial Magistrate John C. Cratsley's holding: "Where that information may well have cast significant doubt on the Commonwealth's ability to meet its burden of proving the composition and weight of the substance, it can hardly be said that the value of such information was outweighed by the reduced sentence that the defendant received in exchange for his guilty plea," at R.A. 298-99.

Consequently - and for the preceding reasons, the Superior Court's reliance upon the particulars of the plea agreement in denying the motion for post-conviction discovery constituted an abuse of discretion.

Conclusion

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

Respectfully submitted
for Bryant Ware,



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COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS		SUPREME JUDICIAL COURT No. SJC-11709.
COMMONWEALTH	)	
	)	
v.	)	CERTIFICATION.
	)	
BRYANT WARE	)	

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

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